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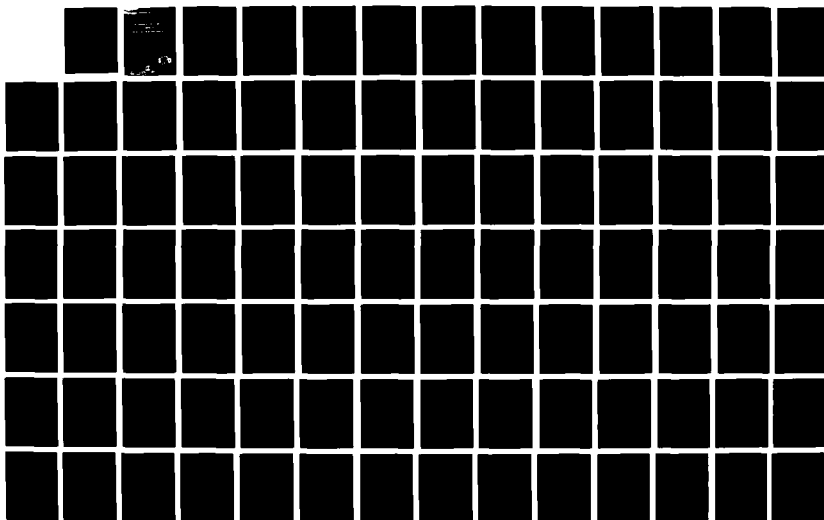
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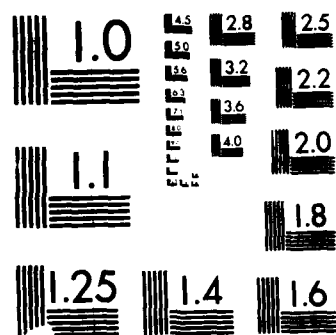
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**AFFORDABLE STRATEGIES  
TO IMPROVE  
INDUSTRIAL RESPONSIVENESS**

**Volume 4: Summary Report on  
Standby and Voluntary Agreements**

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**AFFORDABLE STRATEGIES TO IMPROVE  
INDUSTRIAL RESPONSIVENESS**

**VOLUME 4: FINAL REPORT ON  
STANDBY AND VOLUNTARY AGREEMENTS**

20 January 1987

Prepared for:

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## FOREWORD

This is the final volume in a series of reports summarizing past and present applications of voluntary and standby agreements, potential future applications, and policy and legal issues associated with their wider use. The purpose of this 18-month effort was to determine whether wider application of these tools could improve industrial responsiveness to national security needs.

The authors wish to acknowledge the assistance of a number of people during this project. Richard Murray, former General Counsel of the Office of Emergency Preparedness, provided valuable assistance in helping analyze the legislative history of the Defense Production Act and other emergency planning issues. The law firm of Latham, Watkins and Hills also provided invaluable expertise in antitrust laws, procedures, and principles. We particularly wish to thank their project leader, Edward Shapiro, as well as Richard Danzig and Reed Hundt. Several former Government officials also provided valuable assistance, including M. Arnold Marvin, Dr. William Kincade, Anthony Bertsch, and Charles Downer.

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## EXECUTIVE SUMMARY

### ES.1 INTRODUCTION

✓ This report completes an 18-month examination of the past, present, and potential future applications of standby and voluntary agreements. The objectives of this effort were:

- To determine whether wider use of these two methods would improve U.S. industrial preparedness for emergencies
- To identify policy and legal issues associated with their wider use
- To recommend future actions for FEMA (federal emergency administration)

The first two volumes in this series analyze the past and present uses of standby and voluntary agreements. They examine: their nature and purpose; procedures for creation, maintenance, and activation; and legal issues associated with their wider use. The third volume considers how these methods might to address the responsiveness problems of 15 specific industries. The final volume summarizes findings and recommendations.

### ES.2 PURPOSE OF STANDBY AND VOLUNTARY AGREEMENTS

→ A standby agreement is: a contractual commitment by a private firm concerning specific goods and services to satisfy increased needs during an emergency. It can be used for a variety of purposes, including: ————

- Accelerated and increased production of defense items
- Conversion of commercial capacity to defense production
- Application of commercial resources in a military role
- Earlier production of items needed to support industrial expansion. (JIS)

A voluntary agreement is: an association of companies granted antitrust relief under Section 708 of the Defense Production Act to engage in activities in support of national security needs. It can be used to:

- Help accelerate and increase production of defense items
- Convert capacity, standardize components and production processes
- Alleviate bottlenecks
- Allocate scarce resources
- Improve production scheduling.

More generally, both of these methods also represent broad processes for improving industrial preparedness. The standby agreement represents a process of pre-emergency planning with industry to identify emergency problems and ways to resolve them. The voluntary agreement represents a mutual agreement by industry and Government that a serious national security problem exists and a commitment by these parties to work together to resolve this problem.

### ES.3 BENEFITS

Wider use of voluntary and standby agreements could result in significant improvements in industrial responsiveness. For example:

- During an emergency, voluntary and standby agreements could promote more effective conversion of new producers, help identify and resolve production bottlenecks, and help maximize production within limited capacity
- Standby agreements could reduce the need for peacetime investments in standby production and test equipment by identifying changes in production or test specifications that could increase emergency output from current facilities
- If new production equipment or facilities would be required, standby agreements could provide an effective way to identify these requirements in peacetime so that they could be available sooner in an emergency
- A combination of voluntary agreements, surge option clauses, and educational orders could provide an effective instrument for peacetime conversion or expansion planning.

Voluntary and standby agreements could also resolve peacetime problems, such as helping improve the responsiveness of key defense-supporting industries, identifying enhanced security measures for key facilities, helping resolve unacceptable peacetime bottlenecks, or coping with the aftermath of a major disaster.

Although the cost of the program would be relatively low, it would require some investment by the Government. Voluntary agreements might not require substantial direct

investments, but they would, at a minimum, require the dedication of staff resources to establish, justify, monitor, and implement the agreements. A voluntary agreement involves a private-public partnership to resolve national security problems, and will require a substantial commitment from all parties -- a commitment that could be repaid through improved emergency responsiveness, security, and economic efficiency.

An effective standby agreements program will also require Government commitment of resources. As the analysis in Volume 1 of this series suggested, creating a standby agreement (e.g., a surge option clause in a production contract) has little value without the necessary planning to identify requirements, identify the capability that would meet these requirements, and define activation procedures. In some cases, it may also be necessary to invest in enhanced capabilities.

Nevertheless, this could be an extremely cost-effective expenditure. Currently, the principal means to enhance surge and mobilization capabilities are investments in standby special tooling/test equipment and "rolling inventories" of parts and components. While these investments in production capability involve lower costs than purchasing complete final products, they can still be very expensive. To date, it has only been possible to provide these enhanced production capabilities for a few weapons programs. Standby and voluntary agreements could supplement these ongoing initiatives by identifying ways to work around administrative and production bottlenecks. It could provide relatively small increments of enhanced industrial responsiveness on a comprehensive basis.

The flexibility provided by standby and voluntary agreements is appropriate in peacetime, when the United States faces a vast range of potential national security threats. While the United States cannot afford total preparedness for all possible emergencies, it can undoubtedly afford the much more modest planning costs associated with standby or voluntary agreements. This planning, in turn, can identify the capabilities available to meet potential emergencies, determine the funding or actions needed in a crisis to enhance them, and help provide a more effective response once an emergency occurs.

For this reason, standby and voluntary agreements would be well-suited to a national policy that emphasizes increased peacetime planning and industrial responsiveness. The Federal Government is currently considering the feasibility of such a proposed system. The Department of Defense is considering a proposed system of Industrial Alert Conditions (INDCONs), which would provide a graduated set of industrial response options keyed to a developing emergency. Standby and voluntary agreements would be a key component of an INDCON system.

#### ES.4 RECOMMENDATIONS

Fifteen general and specific recommendations to improve the standby or voluntary agreements program are presented in Chapter 6. The recommendations are:

#1: FEMA and other agencies should develop an industrial responsiveness program strategy that maximizes use of private sector planning and management capabilities.

#2: FEMA should develop a program to educate Federal officials and industry about standby and voluntary agreements.

#3: FEMA should coordinate a program to identify key industrial responsiveness problems and potential applications of standby and voluntary agreements.

#4: FEMA should identify commercial producers who have most or all of the capabilities needed to produce key military items.

#5: The Federal Government should develop and implement a system of industrial alert conditions (INDCONs) that would trigger increased (and appropriate) industrial preparedness activities during a period of rising tensions.

#6: Existing standby agreement programs should be allocated planning and funding resources.

#7: FEMA should upgrade the Machine Tool Trigger Order Program (MTTOP) through increased planning.

#8: Standby agreement programs should be periodically reviewed to ensure that existing resources are being maintained at an appropriate level of readiness and to identify new resources that might be used to fulfill the standby mission.

#9: DoD should promote cost-effective uses of standby agreements for peacetime and emergency acquisition needs.

#10: The need for standby funding mechanisms should be examined and such mechanisms should be created when cost-effective.

#11: FEMA should establish an interagency committee to develop proposed changes to Section 708 of the DPA as the basis for a revitalized voluntary agreement program.

#12: Pending amendments to the DPA, FEMA and other agencies should proceed with efforts to develop voluntary agreements where the need can be shown.

#13: FEMA should revise the Defense Mobilization Order (DMO) concerning voluntary agreements.

#14: Federal officials should establish voluntary agreements during peacetime in cases where they would deal effectively with a serious national security problem.

#15: Federal officials should establish standby voluntary agreements where they would be effective in dealing with anticipated emergency industrial responsiveness problems.



1.

## INTRODUCTION

This is the last in a series of four reports under Contract No. EMW-84-C-1780 for the Federal Emergency Management Agency (FEMA). The purpose of this effort is to identify policy, statutory, and administrative changes necessary to encourage greater use of voluntary and standby agreements and to strengthen, thereby, the Federal partnership with the private sector to improve defense preparedness.

The three other volumes of this series review and analyze past, current, and potential uses of these agreements. Volume 1 focuses on standby agreements, examining six past and current standby agreement programs and presenting a model of how such agreements are established and activated. Volume 2 presents similar information on voluntary agreements. These two volumes provide definitive analyses of the issues surrounding these agreements -- their purposes; their possible uses; their creation, maintenance, and activation; and their benefits and costs. These analyses are based on an extensive review of primary-source documents and on numerous interviews with individuals about past programs. The third volume of this series contains preliminary analyses, or think pieces, on possible ways these agreements could be used in specific industries.

This final volume is intended to stand alone, providing a general overview of the entire project. As required by the contract, it presents findings from the three project phases together with general conclusions and recommendations. In this introductory chapter, we provide a brief characterization of both the standby and voluntary agreement mechanisms.

Chapters 2 and 3 summarize general findings related to the standby and voluntary agreement programs. Chapter 4 presents findings related to possible specific applications of standby and voluntary agreements. Chapter 5 presents general conclusions about potential uses of these programs and Chapter 6 presents recommendations. Two appendices expand on several of the recommendations by presenting detailed discussions of the need for changing existing voluntary agreement legal authorities (Appendix A) and regulations and program descriptions (Appendix B).

## 1.1 STANDBY AGREEMENTS

### 1.1.1 What Is a Standby Agreement?

A "standby agreement" is a contractual commitment by a private firm to provide specific goods or services or to change normal operating practices at the sole option of the Government to help satisfy increased requirements for those goods and services resulting from substantially expanded peacetime military needs or from an emergency. In addition, a standby agreement program involves preparedness planning upon which the agreement is based and may also involve expenditures to enhance standby capabilities.

### 1.1.2 What Is the Purpose of a Standby Agreement?

The primary purpose of a standby agreement is to provide a more rapid and effective response to a military crisis or civil emergency by bringing to bear commercial and industrial resources to satisfy substantially increased requirements. A standby agreement can provide this more effective response several ways.

Activation of a standby agreement can eliminate or reduce the administrative lead time associated with Government contracting. The contracting process can require a period of months to identify potential contractors, develop solicitations, prepare and evaluate proposals, and negotiate a contract. While emergency conditions could speed up this process, Government and contractor administrative resources could be overburdened by the need to place many more contracts at the same time. This could cause delays even if procedures were streamlined. A standby agreement can be activated in hours by a simple oral, electronic, or written communication from the Government authority to the contractor. (Surge option clauses, described in Chapter 7 of Volume 1, are geared primarily to reducing administrative lead times.)

Proponents of standby agreements have often seen administrative lead time reduction as the principal benefit. However, a standby agreement program can improve responsiveness in other ways. For example, planning associated with a standby agreement can reduce or eliminate the time needed to identify emergency requirements. However, adequate planning is not inherent in a standby agreement program, so this potential saving of time may not be realized. (The apparent inadequacy of planning in the Machine Tool Trigger Order Program (MTTOP) and the resulting reduction in potential effectiveness of this program are discussed in Chapter 5 of Volume 1.)

Enhanced (standby) capabilities created in conjunction with a standby agreement can reduce or eliminate the time to provide improved responsiveness. These enhanced capabilities might be in the form of experience (reducing learning curve delays), planning (permitting more rapid action and elimination of potential bottlenecks), and standby equipment

(permitting an immediate increase in operations). (Educational orders, described in Chapter 2 of Volume 1, were specifically designed to create enhanced standby capabilities.)

Finally, the planning generally found in a standby agreement program can serve as a means to orchestrate an emergency response and thereby reduce the inefficiencies that might otherwise result from ad hoc emergency actions. (The Machine Tool Pool Order Program, discussed in Chapter 4 of Volume 1, served this purpose.)

Beyond providing a more rapid and effective response, a standby agreement can also provide a cost-effective alternative to some defense and preparedness expenditures. Commercial and industrial resources available through a standby agreement can obviate the need for comparable Government-owned resources. For example:

- The Civil Reserve Air Fleet (CRAF) program allows the Government to rely on private sector air transport capability instead of purchasing more military airlift capability
- A standby agreement to change specifications in a key bottleneck production or testing process could obtain the same increase in capacity as an investment of millions of dollars in standby production or test equipment
- Surge option clauses, trigger orders, and other standby agreements to enhance industrial responsiveness could reduce the need to invest in inventories of end items or components.

Purchase and maintenance by the Government of the resources needed for an emergency would represent a very expensive form of insurance. By relying on commercial and

industrial resources to meet part of this insurance need, the Government can reduce its peacetime investment cost. Except in cases where the government pays to enhance these private resources, the cost of a standby agreement is nominal, and even when enhancement expenditures are involved, the cost should be a small fraction of that associated with outright purchase and maintenance of comparable resources by the Government.

Because they entail relatively little cost, standby agreements can also provide a more comprehensive and flexible response capability. Planning associated with standby agreements can provide limited enhancements of a wide range of capabilities, which is especially appropriate in peacetime when it may be impossible to provide funding to prepare fully for all foreseeable emergencies or crises. Moreover, the Government can use standby agreements to capitalize on the changing resources available in the private sector. Commercial and industrial firms who offer their resources through standby agreements generally upgrade their capabilities periodically to retain their economic and technological competitiveness.

#### 1.1.3 How Can Standby Agreements Be Used?

In this project, we examined past, present, or possible standby agreements that would:

- Increase the number or accelerate delivery of systems or items currently in production
- Convert or expand capacity to produce critical items

- Modify existing civilian systems or items for military uses
- Use commercial resources for military or emergency purposes
- Make purchase commitments to encourage increased production before the actual requirements are identified
- Modify product designs or production processes to reduce bottlenecks caused by: inadequate tooling and test equipment, lack of raw materials or manpower, long leadtimes, or other causes.
- Refurbish items for military or industrial uses
- Share tooling for critical items.

All of these functions could -- and probably would -- be performed in a crisis, even in the absence of a standby agreement. The standby agreement allows government and industry to identify problems and capabilities prior to an emergency and therefore guarantee a more timely response when required.

#### 1.1.4 How Are Standby Agreements Created?

There is no fixed system for creating a standby agreement. However, several common elements of the standby agreement programs can be combined into a standby agreement systems model. (Such a model is described in Chapter 8 of Volume 2.) These elements include:

- Program/funding authority
- Contracting authority
- Delegation of authority

- Requirements identification/planning
- Priorities and allocation authority
- Creation and maintenance of standby capabilities
- Program review.

The relationships among these elements are shown in Figure 1.1-1.

Program/funding and contracting authorities are delegated to an office within an agency with procurement responsibilities. This office completes standby contracts with private firms that can provide desired goods or services.

Requirements identification and other planning are critical responsibilities that frequently receive insufficient attention in creation and maintenance of a standby agreement. The cell in Figure 1.1-1 labeled "requirements identification" represents a wide variety of possibilities, depending on the nature of the agreement. It could be a simple process where requirements are identified by the "action office" or a more complex process involving a number of agencies and input from industry.

Priorities and allocation authorities are another important element of a standby agreement program. The agency with these authorities (redelegated from FEMA) would generally review the emergency requirements identified by the contracting agency and provide appropriate priorities or an allocation of civilian resources.

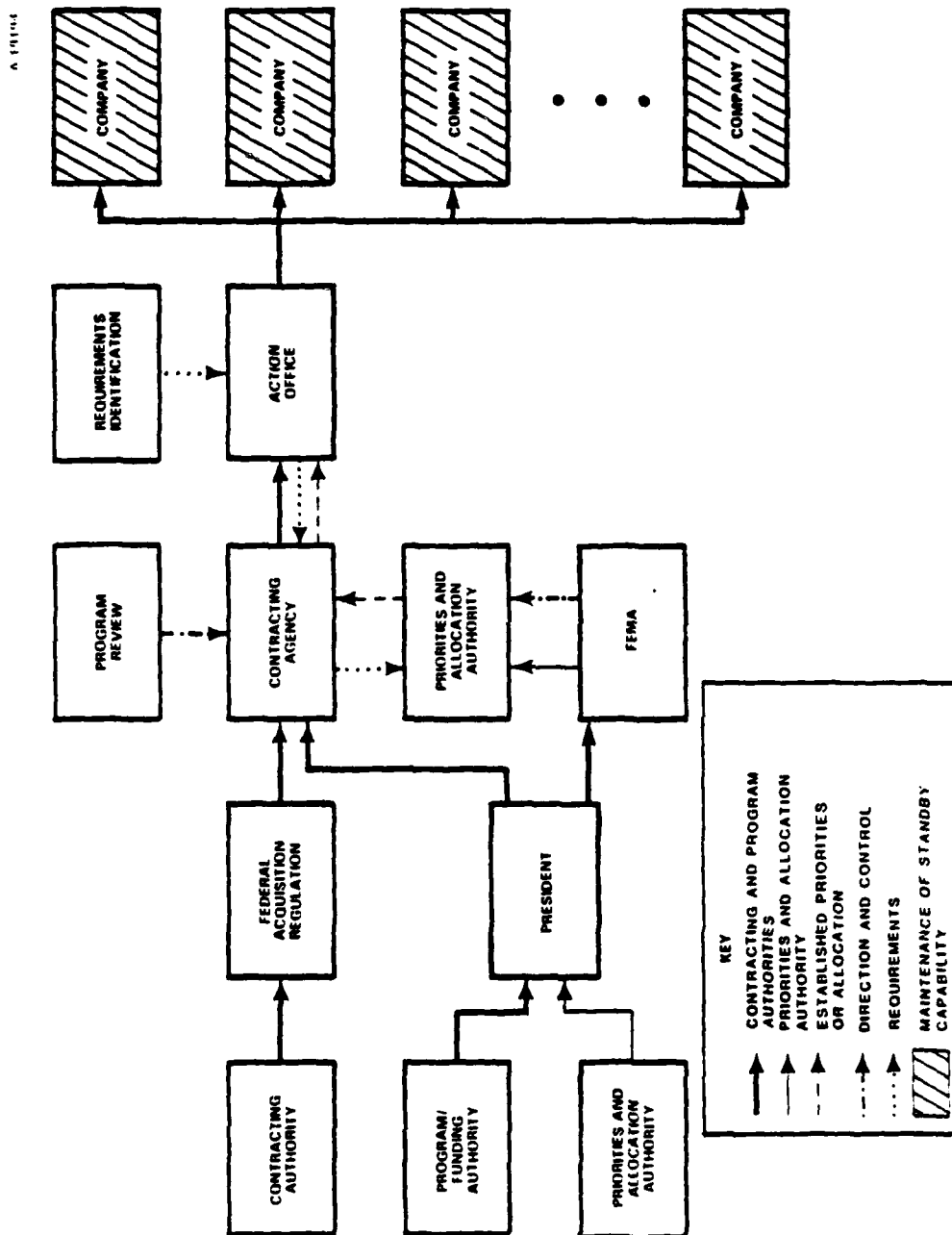


Figure 1.1-1 Establishment of a Standby Agreement Program



Finally, periodic program review is needed to keep a standby program current. This helps make sure that existing agreements remain consistent with product/process trends and changing future military/emergency needs.

#### 1.1.5 How Are Standby Agreements Funded?

Lack of funding can be a major impediment to activation of standby agreements. Contingency funding is generally not available, although unobligated funds could be used to provide stopgap funding. However, additional funds would eventually be needed to sustain the increased effort.

In some cases, a special appropriation (and perhaps even an authorization) might be required before the agreement could be activated. For example, activation of MTTOP contracts could require prior authorization (or review) and funding by Congress.

Funding delays could reduce or even eliminate the effectiveness of the standby agreement mechanism. However, this delay is not inherent in the concept of a standby agreement. It is possible for Congress to provide a contingent authorization and appropriation to permit activation of a standby agreement without further congressional action.

#### 1.1.6 How Are Standby Agreements Triggered?

The opportunity to save time in acquiring goods and services is the foundation underlying the standby agreement concept. Therefore, timely activation of a standby agreement is key to its effectiveness in an emergency. Ironically, planners often fail to consider the conditions under which

these agreements should be triggered when they establish a standby agreement.

In cases where a standby agreement concerns manufactured goods, the desired increase in output would generally take weeks or even months from the time of triggering. In such cases, standby agreements would be far more effective if they were triggered earlier in anticipation of increased requirements rather than later in response to actual need.

Early triggering may be less important for service industries because triggering the agreement can often achieve an almost immediate result. For example, CRAF aircraft could be available to fulfill military airlift requirements shortly after an activation order is issued.

The added benefit from early triggering is not without cost, since greater risk is associated with expenditures in anticipation of requirements. Because of the importance of timely activation, the Government needs to devote considerably more attention to triggering mechanisms and to warning signals and accompanying crisis stages that would suggest activating agreements.

#### 1.1.7 How Effective Is the Standby Agreement Mechanism?

The examination in Volume 1 of six programs that involve standby agreements or elements of standby agreements leads to the following conclusions:

- The standby agreement mechanism offers an effective and efficient means to augment existing Government resources with those of the private sector during an emergency

- The mere existence of a standby agreement does not ensure an effective response to emergencies
- An effective standby agreement program requires preparedness planning (by Government and industry) and a process that ensures timely activation
- Standby agreement programs have received little attention and planning resources unless they have been clearly perceived as cost-effective elements of our national security structure.
- The future effectiveness of standby agreements will be largely contingent on an increased awareness that such responsiveness is important to our national security and that industrial preparedness expenditures are cost-effective.

## 1.2 VOLUNTARY AGREEMENTS

### 1.2.1 What Is a Voluntary Agreement?

A "voluntary agreement" is:

A voluntary association of two or more companies, granted relief from antitrust laws under procedures defined in Section 708 of the Defense Production Act (DPA) of 1950, to engage in specified activities in support of defense preparedness or mobilization programs, that would pose an unacceptable risk of violation of the antitrust laws if carried on outside the procedures of Section 708.\*

\*Although this definition focuses on companies, the DPA authorizes "representatives of industry, business, financing, agriculture, labor, and other interests" to participate in voluntary agreements.

The key elements of this definition are discussed below.

DPA Section 708 Procedures - Section 708 of the DPA allows Federal agencies that have been delegated Presidential authorities to form voluntary agreements if they find that "conditions exist which may pose a direct threat to the national defense or its preparedness programs." While the agency must explain the basis for this finding in its proposal to establish an agreement, no other agency has authority to question the finding.

The DPA also defines procedures for establishing a voluntary agreement. These include requirements for consultation with the Department of Justice and Federal Trade Commission, public notice of meetings, and recordkeeping. (The step-by-step process to establish a voluntary agreement is described in Chapter 7 of Volume 2 of this series. Recommended changes to these requirements are discussed in Appendix A of this volume.)

Support of Defense Preparedness - Under the terms of Section 708, voluntary agreements may be established "to help provide for the defense of the United States through the development of preparedness programs and the expansion of productive capacity and supply beyond levels needed to meet essential civilian demand in the United States." While a direct connection to defense preparedness is necessary, the permitted scope of a voluntary agreement is fairly broad as long as it achieves this objective.

Relief from Antitrust Laws - After the sponsoring agency has developed and approved the voluntary agreement, it must certify that the agreement is necessary to carry out the purpose of the DPA and submit it to the Attorney General for

an antitrust review. Although the Department of Justice is not authorized to question the purpose of or need for the agreement, it may find that the purposes could be accomplished either with an agreement having a lesser anticompetitive impact or without an agreement.

Once the agreement is approved, participants are protected from antitrust charges for actions they take to carry out the agreement. Until the most recent Section 708 amendments (in 1975), participants received immunity from antitrust charges; now the DPA provides participants with a defense against such charges as long as the participant can show that he operated in good faith and in full compliance with the requirements of the DPA. Although it would still be extremely difficult to prosecute successfully (and therefore the risk of charges being brought may be low), this new language adds to the risk for participants. Possible changes are discussed in Appendix A.

Risk of Violation of Antitrust Laws - By definition, a voluntary agreement is a collective activity of business firms in support of defense preparedness. However, not all such collective activities are voluntary agreements. Because the Attorney General can reject a voluntary agreement if he finds that the objective could be accomplished without one (i.e., without antitrust protection), no purpose is served by proposing a voluntary agreement unless the proposed activity would involve some risk of antitrust prosecution.

Participants in voluntary agreements would be most likely to infringe on the provisions of the Sherman Act prohibiting "combinations and conspiracies in restraint of trade." Many of the activities that past voluntary agreements performed -- e.g., allocating business among subcontractors --

would probably be clearcut violations of the antitrust laws. It might be more difficult to assess the risk of other activities, especially because the antitrust laws and court interpretations are fairly subjective.

Establishment of a voluntary agreement also involves creating a Government-industry partnership to resolve a critical problem affecting national security. The voluntary agreements program is a principal organizational legacy of past emergencies, when industry and Government worked together effectively to solve problems that inhibited defense production and mobilization preparedness. (These past programs are discussed in Chapter 2 of Volume 2 of this series.)

#### 1.2.2 How Can Voluntary Agreements Be Used?

Volume 2 of this series examines two distinct past uses of voluntary agreements. The first type, related to production of defense materiel, involved contractors and subcontractors working on a specific weapons program (e.g., military trucks or small arms ammunition). Those sponsored by the Army were called "integration committees," while the Air Force sponsored "production committees." This type of agreement was used to help solve production problems such as:

- Facilitating the conversion of new producers by permitting a free exchange of production experience, data, drawings, etc.
- Standardizing components or production processes among different producers of the same item, either by the exchange of information or by agreement among the participants as to standard techniques and processes

- Alleviating component and materials shortages by sharing order boards and supplies of parts, components, or materials
- Improving the scheduling of production by allowing producers to coordinate their orders and deliveries, allocate subcontracts, pool orders for materials, etc.

There was also a broad category of "miscellaneous" agreements, generally involving nondefense producers. It is more difficult to generalize about the uses of this type of voluntary agreement, because each was unique. Some of these agreements were very similar to the standby agreements discussed in Volume 1 of this series. For example, warehousemen's associations in three major metropolitan areas formed agreements to ensure that storage facilities would be available to military shipments. Similarly, oil tanker operators established a voluntary agreement (which remains in effect) to coordinate provision of tanker capacity for defense shipments. (This agreement is discussed in Section 4.6 of Volume 2.) The principal distinction between these types of voluntary agreements and the "pure" standby agreements appears to be the joint nature of the commitment. Whereas the standby agreement represents a unilateral agreement by a company to provide a specified product or service, these voluntary agreements represented collective agreements to make the specified type of service available.

A second group of "miscellaneous" agreements allowed industries to exercise voluntary economic controls. For instance, steel producers formed a voluntary steel pricing agreement. They agreed not to raise prices for certain types of steel without providing minimum notice to the Government.

Similarly, major lending institutions established a committee to provide guidance on credit policy in order to discourage nonessential lending, channel capital toward essential projects, and restrain excessive inventory growth. (This agreement is discussed in Section 4.2 of Volume 2.)

These past uses suggest the range of potential uses of voluntary agreements. Collective action by companies in an industry or service sector may support a broad range of preparedness goals, such as:

- Coordinating expansion of facilities or conversion of new producers
- Scheduling production to minimize bottlenecks and improve the utilization of current production capacity
- Providing for timely and coordinated delivery of services from transportation, maintenance, and other service sectors
- Supporting preparedness goals through implementation of voluntary economic restraint programs.

#### 1.2.3 When Can Voluntary Agreements Be Used?

Under the terms of the DPA, voluntary agreements can be used at virtually any time as long as they have the general purpose of improving industrial preparedness. Although voluntary agreements have traditionally been used mainly in wartime, they may be used in peacetime to improve preparedness. A number of applications for voluntary agreements are described below.



#### Use of Voluntary Agreements During Mobilization -

During mobilization, agreements might be needed for most critical weapons programs as well as for individual components or materials. Especially during the initial stages of mobilization, voluntary agreements could help support military deployment, coordinate conversion of new producers, and synchronize production. Similarly, agreements to provide essential services or voluntary economic controls might be activated during mobilization. In this situation, the use of voluntary agreements would most closely approach the World War II experience (discussed in Section 2.2 of Volume 2).

Use of Voluntary Agreements During Surge - There are many reasons why the United States might decide to surge production for systems, munitions, or spare parts. Surge production could be ordered in anticipation of conflict, to maintain readiness during an "operational surge," to resupply an ally during or immediately after a local conflict, to support limited conflict by U.S. forces, or to respond to rapid changes in technology or the international environment. Voluntary agreements could improve surge responsiveness by helping coordinate efforts to:

- Qualify new producers, coordinate production schedules, and conduct other activities to resolve shortages of a critical component or assembly in a case such as the tank turret casting shortage caused by surge production to replace Israeli Yom Kippur War tank losses in 1973
- Maintain and repair aircraft and ships during a U.S. force deployment
- Produce and deliver spare parts and munitions during a "readiness surge" or limited conflict

- Establish standards for relaxing test requirements or solving other production bottlenecks that prevent a surge of air-to-air missiles or other munitions
- Increase production of cruise missiles or other strategic programs rapidly to respond to a world crisis or "SALT breakout."
- Rapidly produce chemical protective equipment to support U.S. or allied forces in a situation involving risk of chemical attacks
- Organize local construction contractors to prioritize requirements for construction of military, production, or civil defense facilities.\*

Use of Voluntary Agreements to Avert Disruption -

Unexpected events such as strikes, sabotage, interruption of foreign sources, and natural disasters could disrupt production of military end items or components. Disrupted production at a single key component or subassembly plant could affect production of an entire system or, in some cases, many different systems.

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\*Two of the agreements examined in Volume 2 were used to support "surge" production. In the early 1950s, deteriorating world events suggested the need for a rapid changeover to the B-47 bomber. Instead of confining production increases to Korean conflict requirements, the United States took preparatory actions for a wider, general conflict. In order to accelerate B-47 deliveries, two new producers were established, and the B-47 Production Committee helped them attain rapid production capabilities. Similarly, the Berlin Crisis and Cuban Missile Crisis in the early 1960s led to a decision to accelerate the changeover from the M-1 to the M-14 rifle. A third producer was brought into the program, and the M-14 Integration Committee helped this firm attain a more rapid production capability.

Voluntary agreements could be used to work around these production problems by:

- Coordinating production schedules at plants producing similar items
- Helping qualify new producers
- Providing technical assistance to restore production at the damaged plant (in the case of sabotage or natural disaster).
- Coordinating delivery or restoration of limited transportation, utility or financial services.

Use of Voluntary Agreements to Alleviate Peacetime Bottlenecks - Expansion of defense or commercial aerospace production can cause lead times for many defense systems to increase sharply, as they did in the late 1970s. Because of personnel limitations and the natural reluctance of Government to enforce defense priorities, the existing Special Priorities Assistance program can have only a limited impact in peacetime. A large number of simultaneous bottleneck problems could overload the system. Voluntary agreements might be used as a way to let industry and Government jointly address peacetime production bottlenecks. Voluntary agreements could be used to coordinate prime contractor demand or bottleneck industry production schedules and deliveries.

Use of Voluntary Agreements to Improve the Responsiveness of the Mobilization Base - Voluntary agreements could be used to improve the responsiveness or competitiveness of industries impacted by foreign competition or changing economic conditions. A voluntary agreement could permit a key defense-supporting industry to develop long-range R&D, production, or marketing strategies to improve its economic condition and preparedness posture.

#### 1.2.4 What is the Purpose of a Standby Voluntary Agreement?

The previous section suggests that voluntary agreements can help cope with a wide range of emergency responsiveness problems. Although voluntary agreements should not be used widely in normal conditions, they are likely to be needed at the beginning of a surge, mobilization, or other emergency that requires a sudden change in industrial output.

Because of the substantial administrative lead time to establish voluntary agreements, it might not be possible to use them in a rapidly-developing emergency unless the agreement had been established in advance. Standby voluntary agreements (established and approved, but not activated) represent a cost-effective way to improve surge/mobilization or emergency responsiveness. With the administrative paperwork out of the way, the purpose and activation procedures defined, and members appointed, a standby voluntary agreement could be activated immediately in response to an emergency. (The Foreign Petroleum Supply Committee, discussed in Section 4.4 of Volume 2, provides an example of a voluntary agreement that was relatively inactive during normal situations but able to respond immediately during emergencies.)

2.

## STANDBY AGREEMENTS: FINDINGS

This chapter highlights findings from the study of past and current standby agreement programs. These findings are discussed more thoroughly in Volume 1.

### 2.1 EDUCATIONAL ORDERS

- Educational orders were a means to prepare nondefense manufacturers for conversion to military production (2.1)\*
- Educational order contracts did not include an option clause providing for increased production; they involved an implicit rather than an explicit standby agreement (2.1)
- While no specific decision was ever made to terminate use of the educational order approach, awareness of this preparedness tool appears to have dissipated over time (2.2)
- Educational orders helped achieve a number of industrial responsiveness goals, including: increased defense production capabilities; reduced requirements for munitions stockpiles; trained government procurement personnel; and improved munitions design (2.4)
- The essential elements of an educational order program exist today in ongoing industrial preparedness efforts (2.4.6)

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\*Notes the section in Volume 1 where the finding is discussed.

- A number of problems characterized the educational order program. These were: timely program authorization, funding, and implementation; identification of suitable items for educational orders; application of government regulation; selection of contractors; and proprietary rights (2.5).

## 2.2 PLAN BULLDOZER

- Plan Bulldozer involves a standby agreement between State and local government units and participating chapters of the Associated General Contractors (AGC) concerning disaster relief work by construction contractors. Because contractors are not contractually committed by this agreement to provide services, Plan Bulldozer does not fit a strict definition of "standby agreement" (3.1)
- Elements of Plan Bulldozer hold potential for improving the mobilization responsiveness of the construction industry, if combined with a standby agreement mechanism geared to mobilization. These positive elements of the existing program include private initiative, emergency planning, resource assessment, and coordination (3.4)
- Private sector initiatives to improve mobilization potential are an attractive addition to government-sponsored efforts, but by definition, the Government has somewhat less control over these initiatives (3.5).

## 2.3 MACHINE TOOL POOL ORDER PROGRAM

- Pool orders were not "standby agreements" in the strict sense of the term, but they were intended to provide needed

machine tools on a standby basis in anticipation of actual requirements (4.1)

- Pool orders comprised a large portion of the new machine tool orders during World War II and are believed to have been instrumental in increasing machine tool production. But a variety of other programs also served to stimulate increased tool production and it is impossible to separate the impact of pool orders from that of the other programs (4.4).
- The ultimate cost of pool orders to the Government was extremely small relative to the size and duration of this program (4.4).

#### 2.4 MACHINE TOOL TRIGGER ORDER PROGRAM (MTTOP)

- The MTTOP involves standby agreements between the Government and machine tool builders. The Government commits to purchase tools that are not purchased by private firms (5.1)
- The potential effectiveness of the MTTOP could be enhanced by improved preparedness planning which permitted machine tool orders to be triggered at the same time or even before defense production increases were ordered (5.4)
- The MTTOP suffers from a number of problems, including: the chronic inadequacy of industrial preparedness planning resources; the inability of DoD to identify potential tool requirements; the lack of standby funding; and the poor economic health of the machine tool industry (5.5).

## 2.5 CIVIL RESERVE AIR FLEET (CRAF)

- The CRAF is composed of civil aircraft committed by contractual arrangement to augment U.S. military airlift capabilities during a period of substantially expanded peacetime military airlift requirements or a defense emergency (6.1)
- Four different standby agreements are tied together under CRAF auspices. These include: CRAF; CRAF Enhancement; the expansion option tied to annual airlift services; and Senior Lodger (6.1)
- The CRAF program is a cost-effective means to augment military airlift capabilities during an emergency. Despite several constraints, it is the most carefully established and maintained of the standby agreement programs studied (6.4)
- Use of civil air carrier assets for military purposes poses several problems. These include: the limited applicability of commercial assets to defense purposes; the changing nature of civil assets caused by economic conditions; and the availability of non-military personnel for military situations (6.5).

## 2.6 SURGE OPTION CLAUSES

- The surge option clause is a standby agreement between contractors and the Government to increase production of items currently being produced for the Government (7.1)
- Use of this option would eliminate the normal administrative delay of a number of weeks or months associated with establishment of a new contract (7.4)



- The availability of adequate authorization and funding are the biggest problems associated with use of the surge option clause (7.5)
- The surge option clause applies only to existing production contracts and, therefore, is not being used to increase the responsiveness of other potential producers (7.5).

## 2.7 STANDBY AGREEMENTS SYSTEMS MODEL

- Despite considerable differences among the six programs examined in this report, common elements relating to the establishment and activation of a standby agreement program are evident (8.1)
- Establishing a standby agreement involves some or all of the following elements: program authority; contracting authority; delegation of authority; requirements identification; priorities and allocation authority; creation and maintenance of a standby capability; and program review (8.2)
- Preparedness planning, including identification of potential requirements, is key to an effective standby agreement program (8.2)
- Activating a standby agreement involves some or all of the following elements: determination of need; triggering authority; priorities and allocation authority; regulatory authority; and funding (8.3)
- The later in an emerging emergency situation that the need to activate a standby agreement program is recognized, the less effective the program is likely to be (8.3).

### 3.

### VOLUNTARY AGREEMENTS: FINDINGS

This chapter highlights findings from the study of past and current voluntary agreements. These findings are also discussed in Volume 2.

#### 3.1 INDUSTRY-GOVERNMENT COOPERATION BEFORE 1950

- During all three 20th Century mobilizations, the Federal Government has found it necessary to consult with business, and to allow peacetime competitors to collaborate with each other, in ways that would not be permitted in normal times (Chapter 2)\*
- The present voluntary agreements program can indirectly trace its ancestry to the World War I government-industry committees, under which businessmen advised the Government on industry capabilities, quantities and delivery schedules, prices, and allocations (2.1.3)
- Industry committees provided effective industry coordination with minimal red tape (2.1.6)
- Many critics charged that business obtained unfair advantages during World War I through the unconstrained operation of committees (2.1.4 and 2.1.7)

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\*Notes the chapter or section in Volume 2 where the finding is discussed.

- Two types of industry committees were formed during World War II: industry advisory committees and integration committees (2.2)
- Industry advisory committees were an effective method of providing industry policy views to war mobilization agencies (2.2.2)
- Integration committees assisted the military purchasing departments in solving materials and capacity shortages, promoting standardization, and solving other production problems (2.2.4).

### 3.2 LEGISLATIVE HISTORY AND IMPLEMENTATION OF DEFENSE PRODUCTION ACT INDUSTRY COOPERATION AUTHORITIES

- Section 708 of the Defense Production Act (DPA), which authorized voluntary agreements, was modeled on World War II legislation but provided a more direct role for the Attorney General in reviewing such programs (3.1.1)
- Within a year of enactment of the DPA, 24 voluntary agreements had been approved. The technique was widely used in the Korean conflict to allow industries to solve problems that could impede defense production (3.2.1)
- Advisory committee authority was widely used by national-level mobilization agencies. Many of the same procedures for approving voluntary agreements were adopted for advisory committees (3.2.2)
- Congress restricted voluntary agreements in 1955, narrowing the scope of the program and increasing the role of the Attorney General in monitoring agreements (3.3.1)

- After the Korean conflict, national strategy de-emphasized mobilization planning in favor of short-duration nuclear war planning. These changes undercut any strategic rationale for the program (3.3.2)
- Use of voluntary agreements tapered off rapidly after the end of the Korean War. The decline of the program continued throughout the 1950s and 1960s (3.3.2)
- In 1969, Congress repealed the 1955 amendments to Section 708. However, this action reflected an attempt to use Section 708 for voluntary credit controls rather than a desire to revive the voluntary agreements program (3.4)
- In 1975, Congress adopted an entirely new version of Section 708, which added significant procedural obstacles to the formation and operation of voluntary agreements (3.5)
- Procedures for creating and activating agreements are spelled out in much greater detail than in past versions of the DPA. Significantly, the Attorney General must review the proposed agreement twice before it can be activated (3.5.2)
- Participants in voluntary agreements no longer receive antitrust immunity for their participation in these agreements. Instead, they are offered a "defense" against antitrust charges, but must also show that the action was taken in good faith and in full compliance with the terms of the agreement (3.5.2)
- Rules for carrying out agreements are much more detailed than in the past. Participants must agree to disclose substantial quantities of information. Advance notice must be provided of meetings and interested parties must be permitted to attend, except under certain circumstances (3.5.3)

- These new requirements would slow down implementation of voluntary agreement authorities in an emergency and limit the willingness of corporations to participate in these programs (3.5.4)

### 3.3 EXAMINATION OF SIX VOLUNTARY AGREEMENTS

- During the Korean conflict, four types of voluntary agreements were established: Army integration committees, Air Force production committees, small business manufacturing pools, and miscellaneous agreements. (4.1.1)
- Integration and production committees were established primarily to speed production and increase product standardization (4.1.1)
- Production pools were established to create contracting opportunities for small business firms (4.1.1)
- Miscellaneous agreements were formed by non-defense industries to permit collective action in support of general mobilization goals (4.1.1)
- All forms of voluntary agreements were effective during the Korean conflict except for small business pools, which had little success in promoting business opportunities for small firms (4.1.2)
- The Voluntary Credit Restraint Program provided an effective means to control business credit and supported the defense program by:
  - Restraining growth of debt
  - Channeling capital to essential expansion projects
  - Limiting business inventory growth and hoarding

-- Diverting manpower and materials toward essential defense programs (4.2)

- Despite the effectiveness of the agreement, there was significant political opposition to the program, and it was terminated prematurely (4.2.2)
- The B-47 Production Committee was created in 1951 to help speed production of this radically different jet aircraft during this period of rising superpower tensions by allowing the existing producer to exchange information and coordinate production efforts with two additional (and competing) aircraft manufacturers (4.3.1)
- The B-47 Production Committee is recognized as having expedited production of this much-needed aircraft. However, most of the benefits it achieved could today be accomplished without setting up a voluntary agreement, by employing a leader-follower contracting relationship (4.3.3)
- Petroleum supply voluntary agreements operated virtually continuously from 1951 to 1976 although, during most of this period, Foreign Petroleum Supply Committee activities were confined to an informational function. The Committee did prepare and submit to the Government plans of joint action in response to three petroleum supply crises in 1951, 1956, and 1967 (4.4.2)
- Petroleum supply voluntary agreements have been effective during oil supply crises by providing information on petroleum supplies and coordination of oil supply efforts (4.4.3)
- Public suspicion of petroleum industry manipulations, whether or not justified, limit the acceptability of these types of programs (4.4.3)

- The M-14 Integration Committee was established in 1961 to help speed production of this new standard-issue rifle during a period of rising Cold War tensions by indoctrinating an additional manufacturer on production of this rifle (4.5.2)
- The Committee undoubtedly speeded production from the new producer; however, the benefit of this achievement was diminished by the early termination of M-14 rifle production (4.5.4)
- The Voluntary Tanker Agreement is a standby voluntary agreement. It would deal with the allocation of tanker capacity to meet DoD fuel transportation requirements during an emergency (4.6.1)
- The Voluntary Tanker Agreement was very effective during the Korean War but has not been used since. The current standby program saves the administrative time and resources that would otherwise be needed to create a voluntary tanker agreement during an emergency (4.6.3)
- The Voluntary Agreement of the Munitions Industry is a proposed plan to establish standby procedures for voluntary discussion and planning among private firms and Government arsenals for producing ammunition, propellants, and explosives in response to emergency defense needs (4.7.1)
- It is clear that previous munitions integration committees aided efforts to standardize small arms ammunition. But it is less clear that standardization and other accomplishments would not have occurred in the absence of this committee. The Small Arms Ammunition Committee undoubtedly speeded ammunition production improvements and led to more rapid ammunition production during the Korean War (4.7.3).

### 3.4 RELATED METHODS

- Small business manufacturing pools were originally authorized under Section 708 of the DPA, but are now authorized under the Small Business Act. Because Congress has not continuously restricted the basic authority, small business pools have a much clearer path to approval by the Attorney General than DPA voluntary agreements (5.1)
- Because this program is limited to small business, it does not provide an effective substitute for voluntary agreements, except in very limited cases (5.1)
- Research and development joint ventures are a method to improve competitiveness of U.S. industry. They give limited antitrust protection to participants in joint research and development projects. It is much easier to obtain approval for an R&D joint venture than for a voluntary agreement. However, because of the limited scope of these ventures, this technique does not provide an adequate substitute for most voluntary agreement uses (5.2)
- Several contracting methods are used to achieve multiple production sources and product standardization, two of the principal purposes of voluntary agreements. One particular method, the leader-follower contracting technique, addresses many of the same issues as voluntary agreements, and may serve as an effective substitute for certain applications (5.3).

### 3.5 POTENTIAL USES AND PROBLEMS

- Present legal requirements do not present a fatal barrier to establishing voluntary agreements. However, such



barriers could cause serious difficulties during a crisis, when timely action is more important than in peacetime (6.3)

- Voluntary agreements for non-production purposes are likely to be more important in the future than in the past. Voluntary coordination and controls programs may represent an effective substitute for the direct controls implemented in past mobilizations (6.4.2)
- Voluntary economic control agreements, such as a credit control program, would be permitted under the DPA if they are implemented to support defense preparedness or mobilization programs (6.4.2).

### 3.6 SYSTEMS MODEL

- The process of establishing a voluntary agreement involves the following actors: the sponsor; the Director of FEMA; the Attorney General; the Chairman of the Federal Trade Commission; interested persons (i.e., industry representatives and the public); and other Federal agencies (7.2)
- A sponsor is responsible for administering a voluntary agreement. This includes notifying and consulting other Federal agencies about the agreement and conducting meetings of agreement participants (7.2)
- FEMA should consider revising its voluntary agreements program guidance to resolve ambiguities in current guidance (7.4)

4.

POTENTIAL APPLICATIONS OF STANDBY AND  
VOLUNTARY AGREEMENTS

Volume 3 of this series examines possible applications of standby and voluntary agreements to deal with responsiveness and preparedness problems in a number of important industrial sectors. It discusses potential agreements designed to:

- Identify and resolve bottlenecks
- Increase production of weapons systems
- Stimulate early production of infrastructure resources
- Facilitate use of commercial resources for military applications
- Facilitate an efficient allocation of production resources
- Improve the responsiveness of important defense production, service, and infrastructure support sectors.

This chapter summarizes these possible applications. Rather than develop a prioritized list of the best or most likely candidates for voluntary and standby agreements, we examined a broad range of possible applications in order to present a perspective on the variety of agreements that could be created. (Tables 4-1, 4-2, and 4-3 show the range of applications we considered.)

TABLE 4-1  
POSSIBLE APPLICATIONS - ITEMS AND MATERIALS

INDUSTRY	AGREEMENTS
Tactical Missile	<p>Weapon program integration committee to coordinate conversion and resolve bottlenecks</p> <p>Standby agreement to reduce testing requirements</p>
Helicopter	<p>Weapon program integration committee to coordinate conversion and resolve bottlenecks</p> <p>Surge option with existing producer</p> <p>Educational order to help convert new producer</p>
Forging	<p>Standby agreement to provide for transfer of dies</p> <p>Voluntary agreement to identify and resolve bottlenecks</p>
Semiconductor	<p>Voluntary agreement to help replace foreign sources</p> <p>Standby agreement to identify new production or test methods</p>
Mining	<p>Standby purchase commitments with active mines</p> <p>Educational order with inactive mine (engineering/planning, paperwork, maintenance)</p>

TABLE 4-2  
POSSIBLE APPLICATIONS - FACILITIES AND EQUIPMENT

INDUSTRY	AGREEMENTS
Construction	Standby agreement with defense contractor or construction contractor to provide standby expansion plans  Regional voluntary agreements to prioritize construction requirements
Construction Machinery	Standby purchase commitment for parts or components  Educational orders to promote conversion  Industry voluntary agreement to resolve conversion and civilian production issues
Electronics and Electronic Test	Educational orders to prepare test equipment producers  Test equipment trigger order program  Voluntary agreement to coordinate conversion, resolve bottlenecks
Machine Tool Retrofit	Trigger orders with manufacturers of controls and retrofit kits  Trigger orders with retrofitters to upgrade Plant Equipment Packages and General Reserve  Educational orders with industry for facility surveys and planning  Voluntary agreement to plan and coordinate conversion
Machine Tool	Voluntary agreement to help improve industry's responsiveness
Power Transformers and Circuit Breakers	Voluntary agreement to help improve industry's responsiveness  Trigger order to increase production

TABLE 4-3  
POSSIBLE APPLICATIONS - INFRASTRUCTURE

INDUSTRY	AGREEMENTS
Telecommunications	<p>Industry integration committee (carriers and manufacturers) to resolve production bottlenecks and foreign dependencies</p> <p>Surge option clauses</p> <p>Standby agreement to participate in preparedness planning</p> <p>Voluntary agreement to coordinate emergency planning, service, maintenance, and restoration issues</p>
Financial Services	<p>Voluntary agreement to establish screening criteria for loans</p>
Electric Utilities	<p>Standby agreement for facility vulnerability surveys and enhancement measures</p> <p>Voluntary agreement to identify preparedness options</p>

#### 4.1 POSSIBLE APPLICATIONS: ITEMS AND MATERIALS

##### 4.1.1 Tactical Missiles

- Special tooling and test equipment (ST/STE) is a commonly identified surge bottleneck in the tactical missile industry (2.1)\*
- Increasing the amount of ST/STE to eliminate the bottleneck could require an investment of millions of dollars for each missile production line during peacetime or would entail a delay of many months during an emergency or crisis (2.2)
- A standby agreement to reduce testing requirements could be modelled after the surge option clause to increase production quantities (2.3)
- Such an agreement could help eliminate the ST/STE bottleneck, reduce production lead times, and reduce program costs. It could also lead to reduced product reliability (2.4).

##### 4.1.2 Helicopters

- The inability to obtain parts and components from subcontractors and suppliers in a timely fashion would be the biggest impediment to an immediate and sustained increase in military helicopter output during a mobilization (5.2)
- A standby agreement to increase helicopter production could take two forms: a surge option clause in a current defense contract; and an educational order with

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\*References the section in Volume 3 where the finding is discussed in more detail.

a planned producer for production planning, acquisition of standby equipment and tooling, and actual practice producing the item covered by the order (5.3)

- A surge option clause would entail virtually no direct cost. However, indirect expenditures on industrial preparedness measures (such as rolling inventories of long-leadtime items) could be considerable. Without these expenditures, the potential benefits of speeding helicopter production over the short term could be largely offset by an inability to maintain the higher rate, or even the peacetime level, once part and component inventories have been consumed (5.4)
- Educational orders could be used to prepare companies for production of helicopters whose designs have been modified to eliminate most or all long-leadtime items (5.4)
- Standby agreements are consistent with a current Army Materiel Command initiative to provide mobilization "technical data packages" (TDPs) for critical weapons. Negotiating standby agreements could provide a means to review the feasibility of the TDPs and identify bottlenecks that should be avoided (5.5).

#### 4.1.3 Forgings

- Long lead times for large aerospace forgings are caused in part by the inability to shift business to an alternate supplier when the current supplier cannot perform in a timely fashion (6.1)
- Forging die sets are infrequently transferred between forging companies, so customers are often forced to rely on a single supplier or to bear the additional cost of producing a second set of dies for an alternate producer (6.2)

- Both standby and voluntary agreements could expedite the transfer of forging work to an alternate producer. A standby agreement could provide the option to direct the transfer of dies from one firm to another under defined emergency conditions. A voluntary agreement could permit cooperation among forging companies to direct the allocation of forging work (6.3)
- Participation in either type of agreement might be resisted by the established heavy forging press operators who could view the transfer of dies as a threat to their business bases (6.4).

#### 4.1.4 Semiconductors

- There are numerous barriers to obtaining domestic semiconductor production quickly if output from offshore facilities is cut off (7.1)
- Virtually all major U.S. "merchant" semiconductor producers operate at least one offshore plant where they complete most of their package assembly work and a growing share of their testing (7.2)
- Standby agreements could be used to identify new production or test methods to increase semiconductor production rapidly (7.3)
- A voluntary agreement could deal with potential production problems resulting from loss of supply from offshore semiconductor plants (7.3)
- A voluntary agreement could also be used to facilitate the transfer of semiconductor production and testing to an alternate producer (7.4).



#### 4.1.5 Mining

- Our dependency on foreign sources of supply for many types of raw materials critical to defense and civilian production has long been a major national security concern (10.1)
- Reopening a mine that has been mothballed is a lengthy process, averaging as much as three years (10.2)
- Standby agreements could help speed production increases during an emergency from both active and inactive mining operations. Standby purchase commitments (i.e., trigger orders) could be used for active mines, and educational orders, covering various maintenance activities, could be used for inactive mines (10.3)
- The cost of creating and maintaining an enhanced capability to reopen mines could be large compared to other types of preparedness investments. However, that cost would be low compared to other investments capable of providing improved materials supply (10.4 and 10.5).

#### 4.2 POSSIBLE APPLICATIONS: FACILITIES AND EQUIPMENT

##### 4.2.1 Construction

- Standby agreements could form the heart of a preparedness program to expand production capacity (11.1)
- Defense production levels are much higher today than prior to past mobilization periods. However, considerable expansion of capacity would still be needed to support production increases much beyond current levels (11.2)

- A standby agreement with manufacturers could provide for creating and maintaining standby plans for expansion of existing facilities (11.3)
- A standby agreement with a construction contractor would involve a commitment to provide construction services needed for an expansion effort (11.3)
- The early stages of a major emergency could involve conflicting expansion programs and inadequate government coordinating authority. A network of local or regional construction industry voluntary agreements could coordinate construction schedules and resolve construction bottlenecks (11.4).

#### 4.2.2 Construction Machinery

- The construction machinery industry might play two important roles during a mobilization. It might be required to produce equipment to meet increased construction needs and to convert to production of heavy military vehicles or vehicle components (4.1)
- Trigger and educational orders could be used to expedite increased production of construction machinery and to speed conversion to production of military vehicles (4.4)
- A voluntary agreement could help coordinate delivery of components among subcontractors and prime contractors and allow the industry to resolve production and planning issues related to civilian and military production (4.4).

#### 4.2.3 Electronics and Electronic Test Equipment

- In addition to a standby agreement to reduce testing requirements (as dis-

cussed in Section 4.1.1), two other types of standby agreement could increase the availability of ST/STE. Educational orders with electronics producers could expedite conversion from production and testing of commercial products to defense products. Trigger orders with ST/STE manufacturers could stimulate earlier production of needed ST/STE during an emergency (3.1)

- Voluntary agreements could also address ST/STE problems. Defense ST/STE producers could agree to transfer technical information needed to convert commercial electronics producers to defense work (3.1)
- Purchasing ST/STE to balance peacetime utilization rates is an expensive option. Both educational and trigger orders could defer much of this potential expense until conditions indicate a probable need for substantially increased output (3.2)
- Peacetime planning resources and timely activation during an emergency would be critical for these standby agreements (3.4).

#### 4.2.4 Machine Tool Retrofitting

- The supply of machine tools is a major constraint on the ability to increase production (8.1)
- Conversion and upgrade of existing machine tools through retrofitting can improve machine tool availability (8.2)
- Possible applications of standby and voluntary agreements to enhance retrofit capabilities include:

- Trigger orders with manufacturers of controls and complete retrofit kits to stimulate production of these key items during an emergency
- Trigger orders with refurbishers and retrofitters to remanufacture and upgrade standby equipment in the General Reserve
- Educational orders with equipment owners to expedite retrofits
- Both standby and voluntary agreements could be used to expedite identification of retrofit opportunities, design of equipment modifications, production of retrofit components, and actual retrofit work (8.4).

#### 4.2.5 Machine Tools

- The machine tool industry has always been important in the early stages of mobilization. As a result of increased import penetration, the responsiveness of the machine tool industry in a future military emergency is questionable (9)
- A voluntary agreement could allow the Government and machine tool producers to take actions to restore the industry's competitiveness and responsiveness. Such an agreement could address R&D, production, marketing, and financing issues (9.1)
- Although such a voluntary agreement would represent a novel use of DPA authorities, it would be permissible under current groundrules for an industry such as the machine tool industry (9.3)
- Voluntary agreement authorities under the Small Business Act might provide an alternate vehicle for the voluntary agreement. The administrative process for establishing a Small Business Act

voluntary agreement is much simpler, although the absence of controls could provoke political opposition (9.3).

#### 4.3 POSSIBLE APPLICATIONS: INFRASTRUCTURE

##### 4.3.1 Telecommunications

- The deregulated and more competitive structure of the telecommunications industry can cause a variety of defense responsiveness problems, including:
  - Contracting difficulties
  - Reduced capacity and component inventories
  - Increased foreign sourcing
  - Conflicting emergency production requirements
  - Antitrust problems in coordinating services (12.1)
- A Telecommunications Industry Integration Committee (made up of telecommunications carriers and equipment manufacturers) could address equipment production requirement and supply issues (12.3)
- Standby agreements could also be used to assure reliable equipment supplies or services in an emergency. Surge option clauses and equipment trigger orders could be used to guarantee timely responsiveness to emergency production or maintenance and repair requirements (12.3)
- A second voluntary agreement (comprising local and long distance telecommunications carriers) could be used to help identify and resolve emergency planning and coordination issues (12.3).

#### 4.3.2 Financial Services

- During the Korean conflict, mandatory controls were applied to real estate and consumer credit and a voluntary agreement controlled business credit. In conjunction with monetary policy decisions, these programs helped restrain the growth of debt and channel capital toward essential defense projects. (13)
- A similar voluntary agreement for business credit would play a useful role in a future mobilization (13.2)
- Policymakers and financial institutions should consider whether to include consumer and real estate credit in such a voluntary restraint program. While such a program could supplement a business credit restraint program, it would probably be more difficult to implement and more controversial (13.2 and 13.3)
- A credit restraint program intended to support defense mobilization would be permitted under existing DPA authorities (13.3)
- A private sector program to allocate credit could be more effective than reliance purely on monetary policy and market forces in supporting defense expansion goals. Such a program would avoid more controversial direct economic controls (13.4).

#### 4.3.3 Electric Utilities and Power Transformer/Circuit Breaker Production

- The reliability of electric power supplies during an emergency is threatened by the vulnerability of key production and distribution nodes and by long lead times for production of replacement equipment. The general lack of standby replacement equipment and the continuing decline of domestic production sectors complicate the reliability problem (14.1)

- Voluntary and standby agreements could be used to address three different problems that reduce electric power reliability:
  - Economic health of the power equipment producers
  - Long-term responsiveness (reducing lead times to produce replacement equipment by weeks or months)
  - Short-term responsiveness (providing standby replacement equipment inventories or reducing the risk of disruption by identifying ways to improve security and reliability) (14.2)
- Concurrence of State regulatory agencies would be needed to implement many of these agreement options (14.3)
- The establishment of the agreement might be an important step in focusing the attention of Federal and State officials, equipment producers, and electric utilities on the problem (14.4).

CONCLUSIONS

This chapter presents general conclusions about the potential uses of standby and voluntary agreements.

## 5.1 POSSIBLE USES

Implementation of standby and voluntary agreements could improve industrial preparedness for a wide range of emergencies. Wider application of traditional approaches would be one way to achieve these benefits. These include:

- Use of voluntary agreement authorities to establish integration committees. Integration committees could be used in a wide range of emergency situations, as they were in past mobilizations, to speed conversion of new producers and identify and solve production bottlenecks.
- Use of the trigger order concept (such as the current Machine Tool Trigger Order Program) to identify requirements and provide contingent purchase agreements for other materials, components, or equipment that would be needed in an emergency
- Use of educational orders to identify facilities requirements, train and qualify new producers, and purchase necessary production and test equipment
- Use of surge option clauses to identify production requirements and capabilities and minimize administrative lead times in an emergency.



A number of possible new uses of these authorities could also improve industrial responsiveness. These include:

- Creation of voluntary agreements among subcontractor and supplier companies. This type of voluntary agreement, never widely used in the past, would let critical lower-tier industries determine how to support the demands of multiple production programs. (Past production-related voluntary agreements, organized on the basis of individual defense programs, could not effectively address "horizontal," lower-tier capacity problems that affected multiple programs)
- Use of voluntary agreements to help industries rapidly replace lost foreign sources or cope with other production disruptions caused by natural disaster or sabotage
- Use of voluntary agreements to improve the responsiveness of key defense-supporting industries that have been unduly impacted by changing economic conditions
- Use of standby agreements to identify ways to resolve bottlenecks by changing production or test specifications during an emergency.

## 5.2 BENEFITS

Wider use of voluntary and standby agreements would result in significant improvements in industrial responsiveness. During an emergency, voluntary and standby agreements could promote more effective conversion of new producers, help identify and resolve production bottlenecks, and help maximize production within limited capacity. Standby and voluntary agreements could also provide the basis for a more effective surge and mobilization planning program:

- Standby agreements could reduce the need for peacetime investments in standby production and test equipment by identifying changes in production or test specifications that could increase emergency output from current facilities
- Standby agreements would help identify possible new production equipment or facility requirements in peacetime so that they could be available sooner in an emergency
- A combination of voluntary agreements, surge option clauses, and educational orders could provide an effective instrument for peacetime conversion or expansion planning.

By providing a focus for planning activities, guaranteeing access to commercial resources in an emergency, and defining the process by which these resources would be made available, these programs would provide assurance (that is presently lacking) that emergency production requirements could be met.

The program would require some investment by the Government. Voluntary agreements might not require substantial direct investments, but would, at a minimum, require the dedication of a considerable amount of personnel time. A voluntary agreement involves a private-public partnership to resolve national security problems. It will require a substantial commitment from all parties -- a commitment that could be repaid through improved emergency responsiveness, security, and economic efficiency.

The Government must also commit resources (principally Government and industry planners' time) to have an effective standby agreement program. Creating a standby agreement has little value without the necessary effort to identify

requirements and capabilities, define activation procedures, and, as necessary, invest in enhanced capabilities.

Nevertheless, this could be an extremely cost-effective expenditure. Within the Department of Defense, the principal means identified to enhance surge and mobilization capabilities are investments in special tooling, test equipment, and "rolling inventories" of parts and components. Because of their expense, it has only been possible to provide these enhanced production capabilities for a few weapons programs. If a standby and voluntary agreement program could identify ways to minimize administrative, production, and test bottlenecks, it could be an effective supplement to ongoing surge/mobilization initiatives. It would enhance industrial responsiveness on a much more comprehensive basis, even if the individual enhancements were more limited.

### 5.3 COORDINATING EMERGENCY PREPAREDNESS

Voluntary and standby agreements, together with less formal methods of industry-Government cooperation, could form the basis for a new approach to national preparedness. This new approach would provide increased emphasis on:

- The role of the private sector in identifying and resolving problems during an emergency
- Pre-emergency planning and identification of specific actions that would be performed during an emergency
- Identifying cost-effective options that can improve responsiveness to a wide range of emergencies
- Identifying the types of problems that would be likely to occur during different

types of emergencies and methods to address each of these problems

- Improving the capability and responsiveness of important national security-supporting sectors.

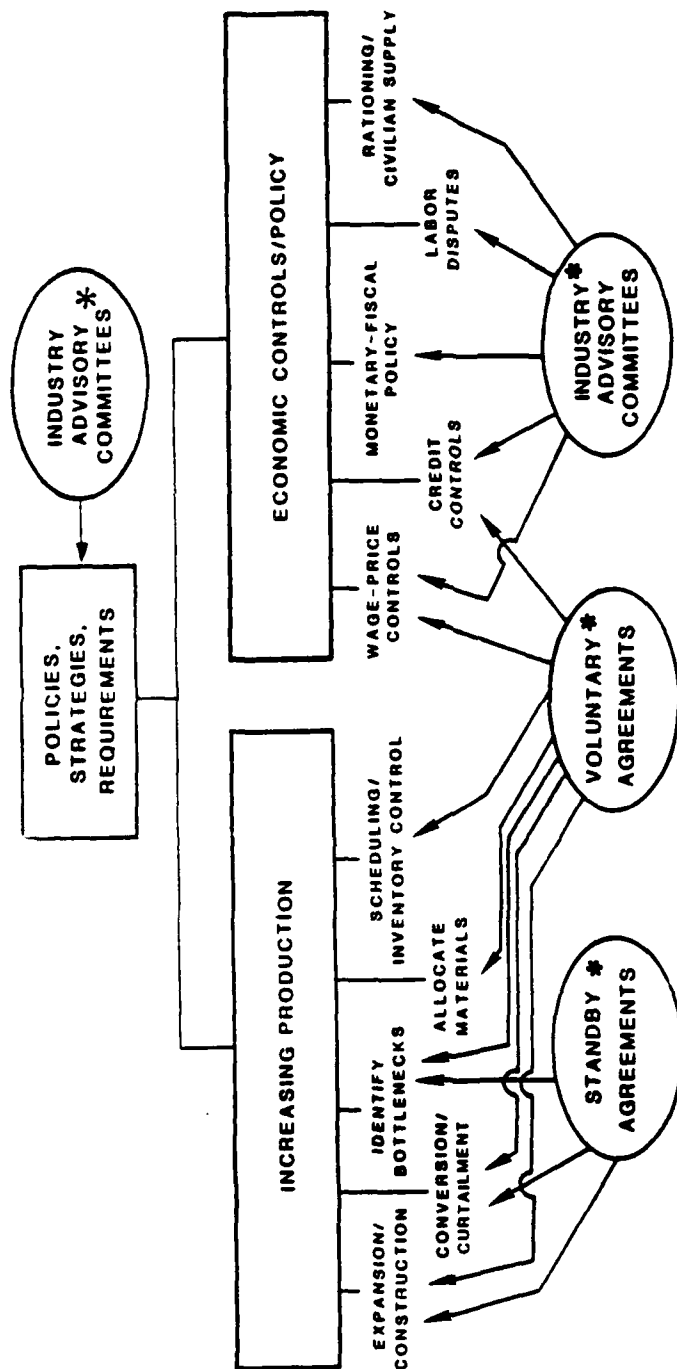
The Federal Government now is larger and more capable than it was prior to past mobilizations. However, emergency planning functions have atrophied in many agencies in the past 15 years. The Federal Government is not effectively postured to carry out the many functions that would be required during a major emergency, and major funding is generally not available for preparedness investments.

Industry has played an important role in resource management during past mobilizations. Even though the organizational model defined in the two most recent mobilizations (World War II and Korea) emphasized central Federal control, industry played an important role in identifying and resolving production problems. (See Chapter 2 of Volume 2 of this series.)

Figure 5.3-1 presents a simplified representation of some of the more important functions that have been performed in past mobilizations. It suggests how some of these functions could be planned for and carried out more effectively through the support of industry committees (including voluntary agreements) and pre-emergency planning with industry (including development of standby agreements).\*

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\*For a more general discussion of resource management programs in past mobilizations, see Reed, L. S., et al., "Resource Management: An Historical Perspective," The Analytic Sciences Corporation, TR-5035-3, Washington, D.C., 1984.



\* SUPPLEMENTED BY GOVERNMENT COORDINATION, IMPACT ASSESSMENT, AND APPROPRIATE DECISION/ENDORSEMENT AUTHORITY

Figure 5.3-1 Coordinating Emergency Response

## 5.4 TIMING CONSIDERATIONS

One advantage of increased reliance on standby and voluntary agreements is that they can improve the ability of U.S. industry to support a wide variety of emergency situations. Table 5.4-1 shows the different types of emergency situations where voluntary and standby agreements could be used. The following sections discuss some of these timing considerations.

### 5.4.1 Peacetime Planning

As shown by Table 5.4-1, one advantage of standby and voluntary agreements is the fact that planning and development of agreements are the principal activities required during normal conditions. Relatively small investments are required to develop and maintain these agreements.

This approach avoids the traditional problems with peacetime preparedness investments:

- Budget limitations that prevent complete preparations for all foreseeable emergencies
- The risk of product obsolescence if funds are spent to purchase component or end item stockpiles
- Inability to determine, before an emergency, which weapons, systems, or processes will be most critical.

Planning under these agreements would provide limited immediate enhancements to emergency capabilities and identify specific investments and actions that would be instituted later as the nature of an emergency becomes clearer.

TABLE 5.4-1  
USE OF VOLUNTARY AND STANDBY AGREEMENTS  
DURING EMERGENCY SITUATIONS

WA86-0749

<div style="text-align: center;"><div style="display: flex; justify-content: space-between;"><div style="writing-mode: vertical-rl; transform: rotate(180deg);">TIMING</div><div>AGREEMENT</div></div></div>	PEACETIME PLANNING	BOTTLENECKS/DISRUPTIONS	SURGE	PRE-MOBILIZATION PREPAREDNESS	MOBILIZATION	<div style="border: 1px solid black; padding: 5px; width: fit-content;">Key x = develop agreement o = implement agreement</div>
						CHAPTERS IN VOLUME 3
<u>Voluntary Agreements</u>						
Industrial Responsiveness Agreements	x	o				9,12,14
Lower-Tier Industry Agreements	x	o	o	x/o	o	3,4,6,7,8,11
Weapons Program Integration Committees	x	o	o	x/o	o	1,4
Other Agreements				x	o	12,13
<u>Standby Agreements</u>						
Surge Option	x		o	x	o	5,12,14
Educational Order/ Plant Survey	o	o		o		3,4,5,8,14
Equipment Trigger Orders/ Standby Purchase Agreements	x	o		o		3,4,8,10
Agreement to Change Specifications	x		o			2,5,7
Plant Expansion Agreements	x			o	o	10,11
Other	x					6,14

#### 5.4.2 Peacetime Bottlenecks and Disruptions

While standby and voluntary agreements would not be widely used during "business-as-usual" conditions, they could be used to cope with a variety of peacetime defense production problems. Voluntary agreements could be used to help resolve unacceptable production bottlenecks or enhance the responsiveness of industries threatened by foreign competition or changing economic circumstances.

Voluntary agreements could also be used to coordinate an industry's or weapon program's recovery from a major disaster, such as a catastrophic earthquake. Standby agreements could also be used to improve disaster preparedness by surveying vulnerabilities, identifying remedial measures, and defining when these measures would be implemented.

#### 5.4.3 Surge

A surge in production could be required to support conflict (or imminent conflict) by U.S. or Allied military forces, or it could be required to support a variety of emergencies not involving the threat of conflict. A surge might occur for a single weapon system, selected critical items, or many critical items.

With the exception of acquisition streamlining or peacetime investments in standby inventories, stockpiles, or production equipment, standby and voluntary agreements may represent the only feasible way to improve surge responsiveness. Surge option clauses would identify industry capabilities and help to avoid administrative bottlenecks in the procurement system. Standby agreements to change production or test specifications would help identify likely bottlenecks



in peacetime and allow their correction in the initial stages of surge. Agreements modelled on the CRAF program could provide immediate access to commercial resources. Voluntary agreements could also help to coordinate initial production efforts, although they could only contribute during the early stages of surge if they had been established on a standby basis before the emergency.

#### 5.4.4 Pre-Mobilization Preparedness Actions

The principal difference between surge and mobilization is that surge relies on rapidly increasing output from current defense producers, while industrial mobilization would create new defense production capacity through expanding facilities or converting nondefense producers. Actions to surge production from the current defense industrial base will not necessarily prepare industry for subsequent mobilization. Because of the limits on surge production (generally a doubling or tripling of current output) and the extremely high consumption and attrition rates for modern combat, significant capacity expansion would be needed for many contingencies far short of sustained, superpower conflict.

Development and execution of standby and voluntary agreements could help prepare for subsequent expansion during a surge in production. For example:

- Educational orders for noncurrent producers could prepare them for subsequent production contracts
- Trigger orders could persuade equipment producers or mining companies to begin production of necessary equipment or re-opening mines before commercial demand had developed

- Standby plant expansion agreements could be executed to begin construction of facilities that would be needed in the future.
- Agreements to enhance security at essential facilities might also be triggered, if circumstances warranted.

The premobilization warning phase would also provide an opportunity to complete preparedness planning that had been neglected in peacetime. Standby voluntary agreements could be created for weapons programs or industries most likely to require extensive conversion of new producers or to experience production problems in a mobilization. In addition, some voluntary agreements could be activated to help coordinate preparatory actions and to resolve bottlenecks as they arose. These activities would improve the mobilization posture of U.S. industry, but would still avoid the expense and potential economic dislocation of all-out mobilization. Thus, the programs could help provide a measured response to an increasing, but perhaps still ambiguous, national security threat.

#### 5.4.5 Mobilization

During a major mobilization, voluntary agreements could be instrumental in coordinating production. Agreements might be activated to help coordinate many major weapons programs and to resolve bottleneck problems in lower-tier industries. Another possible voluntary agreement discussed in this report, the financial services voluntary agreement, would probably be activated at this time, if not earlier. Disruptions, inefficiencies, and delays during the initial stages of mobilization could be minimized through use of these programs, especially if the preparatory actions discussed in earlier sections had been taken prior to the onset of mobilization.

#### 5.4.6 Standby/Voluntary Agreements and INDCONs

The Federal Government is presently considering the establishment of a system of Industrial Alert Conditions (INDCONs). INDCONs would provide a graduated set of industrial response options, keyed to the stages of a developing emergency. Adopting INDCONs would imply a shift in Government policy to place greater emphasis on pre-crisis emergency planning and industrial responsiveness in the early stages of an emergency. According to the Department of Defense annual report, INDCONs would:

"Prioritize and implement peacetime measures to improve industrial responsiveness, help reduce the time required by industry to meet emergency needs, and provide a predeveloped set of response options for use during crises."\*

The preceding sections suggest how standby and voluntary agreements would be applied in various stages of an emergency. They would be an integral part of any system relying on crisis industrial responsiveness, such as INDCONs. They would contribute to INDCON implementation in three ways:

- By providing accurate information on crisis industrial responsiveness capabilities and identifying necessary enhancement measures
- By identifying crisis responsiveness lead times for increased production and the necessary response times that must be built into the system

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\*Department of Defense, "Report of the Secretary of Defense, Caspar W. Weinberger, to the Congress on the FY88/FY89 Budget and FY88-92 Defense Programs," Washington, D.C., 1987. pp. 139-40.

- By facilitating a more effective industrial response during an emergency.

## 5.5 SUMMARY

Increased use of voluntary and standby agreement authorities would be a cost-effective way to improve industrial responsiveness and to provide a focus for responsiveness planning efforts. Pursuing these efforts will require a substantial commitment on the part of the Government -- of personnel as well as investment funds. Industry will not support these activities, or even take them seriously, if the Government does not commit these resources. Moreover, there would be little benefit in developing these agreements without the resources required to develop realistic plans and programs.

Although these programs are relatively cost effective, it will not be possible to pursue all potential standby and voluntary agreements at once. Government resources for improving preparedness and responsiveness are limited. It will be necessary to identify the highest priority programs and industries. However, if the Government does commit the resources necessary to develop these programs, its investment could be repaid many times over. Payment would come in terms of improved efficiency and responsiveness to a wide range of emergencies and an improved Government-industry partnership to address national security problems.

6.

## RECOMMENDATIONS

This chapter lists and explains recommendations for Federal Government actions to apply standby and voluntary agreements to improve industrial responsiveness and preparedness.

### 6.1 GENERAL RECOMMENDATIONS

Recommendation #1: FEMA and other agencies should develop an industrial responsiveness program strategy that maximizes use of private sector planning and management capabilities.

Private sector management resources and expertise are valuable assets for preparedness planning and emergency management. Industry has played a key role in managing past industrial mobilizations. Given the current trend towards deregulation and reduced Government capabilities to oversee private sector behavior, private industry's management role would be even more important during a future emergency or crisis that required major shifts in industrial output.

Recommendation #2: FEMA should develop a program to educate Federal officials and industry about standby and voluntary agreements.

Federal and industry officials are generally unaware of the standby and voluntary agreement mechanisms, so it is only natural that these mechanisms are rarely used. And yet,

they could be the most cost-effective solutions to many problems facing Government decisionmakers. Educational programs would raise general awareness of these mechanisms and lead to their more effective use. Handbooks or manuals describing program applications, benefits, and procedures should be developed for distribution to Federal and industry officials. In addition, seminars to explain the programs to FEMA regional and industry personnel should be developed.

Recommendation #3: FEMA should coordinate a program to identify key industrial responsiveness problems and potential applications of standby and voluntary agreements.

Although standby and voluntary agreements can be cost-effective, availability of resources will still limit the initial application of these authorities. In cooperation with other agencies, FEMA should establish emergency preparedness planning priorities and identify critical sectors for initial application of standby and voluntary agreements. Decisions should be made on a fundamental strategy. This involves selecting one or more of the following areas for initial concentration:

- Improving the economic health and responsiveness of key sectors
- Improving the security of infrastructure industries
- Promoting rapid surge responsiveness among current defense producers
- Planning for more effective actions during mobilization.

Recommendation #4: FEMA should identify commercial producers who have most or all of the capabilities needed to produce key military items.

DoD naturally focuses most of its attention on current defense contractors and gives relatively little consideration to planned producers. FEMA could complement DoD's analytic efforts by examining the capabilities of various commercial producers to convert to defense production during an emergency and by identifying cost-effective measures, including standby and voluntary agreements, that would enhance these capabilities.

Recommendation #5: The Federal Government should develop and implement a system of industrial alert conditions (INDCONs) that would trigger increased (and appropriate) industrial preparedness activities during a period of rising tensions.

Timing is key to effective use of voluntary and standby agreements. If these agreements are not activated in a timely fashion, they do not contribute to industrial responsiveness. A system of INDCONs could provide a set of "triggers" to activate standby agreements, standby voluntary agreements and other industrial response options at the appropriate time in a crisis.

## 6.2 STANDBY AGREEMENT PROGRAM RECOMMENDATIONS

Recommendation #6: Existing standby agreement programs should be allocated planning and funding resources.

Standby agreements do not provide "something for nothing." They must be accompanied by emergency planning and maintenance of standby capabilities. The mere existence of a signed contract does not guarantee crisis responsiveness. While it could reduce the administrative delay resulting from the contracting process, the signed contract would not otherwise contribute to the efficient and effective use of industrial resources during an emergency. Minimal emergency planning and investments in standby capabilities that complement active industrial capabilities enhance the ability to use industrial resources to their best advantage during an emergency.

Recommendation #7: FEMA should upgrade the Machine Tool Trigger Order Program (MTTOP) through increased planning.

The MTTOP is currently little more than a number of signed standby contacts between the Government and machine tool builders. In the absence of credible emergency planning with respect to both potential machine tool requirements and activation of the standby contracts during an emergency, the current program contributes little to industrial responsiveness. FEMA should actively promote the planning needed to make the MTTOP a valuable program.

Recommendation #8: Standby agreement programs should be periodically reviewed to ensure that existing resources are being maintained at an appropriate level of readiness and to identify new resources that might be used to fulfill the standby mission.

Private sector production resources are continually changing in the face of changing market demand and technologies. For example, the U.S. machine tool industry has suffered a



steady erosion of production capabilities in recent years as imports have claimed an increasing share of the U.S. market for tools, and air carriers have been shifting away from large three- and four-engine wide-body aircraft to smaller two-engine aircraft. Both of these changes affect existing standby agreement programs (i.e., MTTOP and CRAF). In addition, changes in mobilization plans and assumptions can require continuing changes in the standby capabilities needed.

Recommendation #9: DoD should promote cost-effective uses of standby agreements for peacetime and emergency acquisition needs.

Surge option clauses are gaining wider use in conjunction with current defense procurements. However, the simple addition of surge option language in defense contracts does little for industrial responsiveness without emergency planning and cost-effective investments in industrial preparedness measures. Targeted use of surge option clauses, accompanied by a modest increase in planning and funding support, could significantly improve industrial responsiveness. Educational orders could also improve responsiveness while improving peacetime competition (by enhancing the capabilities of potential alternate producers).

Recommendation #10: The need for standby funding mechanisms should be examined and such mechanisms should be created when cost-effective.

Standby agreements can not be activated in the absence of appropriated funds. The delay associated with acquiring such funds could reduce or eliminate the potential benefits derived from standby agreements. For example, few, if any, MTTOP contracts could be activated during an emergency

without prior congressional funding action. A standby appropriation could eliminate the need for additional congressional action during an emergency.

### 6.3 VOLUNTARY AGREEMENT PROGRAM RECOMMENDATIONS

Recommendation #11: FEMA should establish an inter-agency committee to develop proposed changes to Section 708 of the DPA as the basis for a revitalized voluntary agreement program.

This project has identified a number of requirements in Section 708 of the DPA that could significantly delay revival of this program and limit its potential. If FEMA can demonstrate that these requirements are preventing preparedness actions that would otherwise be undertaken, Congress should be receptive to reasonable proposals to amend Section 708.

The 1975 amendments to Section 708 were largely enacted to provide more oversight of one particularly controversial voluntary agreement involving international oil companies. Shortly after approval of the 1975 DPA amendments, the reason for these stricter controls was eliminated: the approval later that year of the Energy Policy and Conservation Act (EPCA) transferred authorization of the international energy agreement from the DPA to EPCA. Changing the DPA would have no impact on the agreement that stimulated the 1975 amendments because it is no longer authorized by the DPA. The congressional committee report on the 1975 amendments supported the use of voluntary agreements for defense preparedness, and FEMA should have reasonable prospects of success if

it can show the importance of its proposals for defense preparedness.

There is a degree of risk in pursuing any legislative proposal. Although current Section 708 authorities are administratively complex, they are substantively quite flexible. Both the original 1975 legislative proposal and the provisions that actually governed the program between 1955 and 1969 were more restrictive than the current legal requirements. (The legislative history of Section 708 is discussed in Chapter 3 of Volume 2 of this series.) However, FEMA can present a strong justification for proposed changes to the DPA. (Possible changes are outlined further in Appendix A of this report).

Recommendation #12: Pending amendments to the DPA, FEMA and other agencies should proceed with efforts to develop voluntary agreements where the need can be shown.

The revival of the voluntary agreement program could be delayed more by a sequential strategy (amending the DPA before development of voluntary agreements) than by the DPA requirements themselves. Rather than awaiting Congressional action, agencies should proceed with efforts to develop a limited number of voluntary agreements. Moving forward with voluntary agreements will demonstrate the preparedness community's intention to use these authorities, and if current requirements prove to be insurmountable, will improve the justification for the proposed amendments.

Recommendation #13: FEMA should revise the Defense Mobilization Order (DMO) concerning voluntary agreements.

The revision should eliminate procedures not required explicitly by law and provide guidance on legislative requirements not presently explained in the DMO. The voluntary agreements systems model (Chapter 7 of Volume 2) noted that the DMO describing the voluntary agreements program describes a more cumbersome process to establish a voluntary agreement than the DPA requires. Another FEMA document, describing Major Emergency Actions, complicates the issue further by describing an even more complex process. In addition, the DMO does not mention or define the concept of standby voluntary agreements.

These program documents will impede development of voluntary agreements by creating confusion among sponsors and participants and by requiring administrative procedures that go beyond those imposed by law. FEMA should convene an inter-agency group to identify the objectives of the voluntary agreements program and eliminate unnecessary extralegal requirements. The group should then proceed to harmonize regulations and other program documents with these decisions. (Appendix B discusses this recommendation in more detail.)

Recommendation #14: Federal officials should establish voluntary agreements during peacetime in cases where they would deal effectively with a serious national security problem.

Voluntary agreements should not be a standard peacetime practice, but they could be the most effective solutions to some specific peacetime production problems. For example, voluntary agreements might be an effective means to help

restore the competitiveness of essential industries. They could also supplement the existing Special Priorities Assistance program to resolve peacetime production bottlenecks. They could also be used to help Government and industry jointly address preparedness planning and responsiveness problems. They would be effective wherever cooperation among industrial competitors or between Government and industry could help solve a production or preparedness planning problem.

Recommendation #15: Federal officials should establish standby voluntary agreements where they would be effective in dealing with anticipated emergency industrial responsiveness problems.

In cases where an active peacetime voluntary agreement is unnecessary, creating a standby voluntary agreement can be an effective preparedness action. The time-consuming process of creating voluntary agreements would prevent their use during the early stages of an emergency. By contrast, activating a standby voluntary agreement can be a simple and short process. The availability of standby voluntary agreements could be critical in the immediate aftermath of a disaster or in the first days and weeks of a surge or mobilization. The government and industry should identify those programs or industries most likely to be critical in an emergency and establish standby voluntary agreements during "normal" times, when time is not an important consideration.

APPENDIX A  
SUGGESTED CHANGES TO SECTION 708 OF THE DPA

## SUGGESTED CHANGES TO SECTION 708 OF THE DPA

Recommendation #11 suggested that FEMA develop a package of proposed amendments to Section 708 of the DPA. This appendix discusses recommended amendments.

As noted previously, Congress amended the authorities for voluntary agreements extensively in 1975. While the new version of Section 708 of the DPA is substantively quite flexible, it adds a substantial number of new procedural requirements to the process for developing, approving, and implementing a voluntary agreement. Generally, the 1975 amendments:

- Added a second requirement for the Department of Justice and Federal Trade Commission to review voluntary agreement proposals before they can be activated
- Established several public notice and other procedural requirements that could delay establishment and operation of voluntary agreements
- Established elaborate record-keeping and disclosure requirements for the sponsors and participants
- Limited the antitrust relief afforded participants in agreements and required them to meet a substantial burden of proof before even the limited protection is available.

These new requirements could substantially limit the utility of the voluntary agreements program. The first two types of requirements mentioned above could significantly

delay creation of voluntary agreements. These delays could make it more difficult to establish these programs in an emergency, when they would be critically needed. Perhaps more important, they could make Government agencies more reluctant to undertake the effort to establish standby (or active) voluntary agreements in peacetime.

The third and fourth types of requirements would also impede operations of voluntary agreements by increasing the effort required for record-keeping. They could also make industry extremely reluctant to participate in these programs. The following sections describe recommended changes to Section 708 and describe how these changes would improve implementation of the voluntary agreement program.

#### A.1 JUSTICE DEPARTMENT/FEDERAL TRADE COMMISSION REVIEWS

Two new 1975 requirements that relate to Justice Department/FTC reviews will delay development of voluntary agreements. These are discussed in the following section.

##### A.1.1 New Requirements

Dual approval - Before 1975, Subsection 708(c)(2) of the DPA required that sponsors:

.... consult with the Attorney General and with the Chairman of the Federal Trade Commission not less than 10 days before making any request or finding [under Section 708] ... and ... obtain the approval of the Attorney General to any request ... before making the request.



This section was amended in 1975 to require that sponsors:

... consult with the Attorney General and with the Federal Trade Commission not less than 10 days before consulting with any persons ... and ... obtain the prior approval of the Attorney General, after consultation by the Attorney General with the Federal Trade Commission.

Congress also added a new Subsection (f)(1), which provides that:

a voluntary agreement may not become effective unless and until ... the Attorney General (after consultation with the Chairman of the Federal Trade Commission) finds, in writing, that [the] purpose [of the voluntary agreement] may not reasonably be achieved through a voluntary agreement having less anticompetitive effects or without any voluntary agreement.

This amendment changes the procedure for establishing a voluntary agreement by requiring two separate consultations with the Justice Department and FTC -- one prior to development of the agreement and a second after the agreement has been developed. While the Justice Department is reviewing the proposals, no further actions can occur.

A formal dual approval requirement is not justified. While neither of the reviews need take a long time, there are no time limits and they could add substantially to the lead time to establish an agreement. Moreover, although Congress consciously restricted the authority of the Justice Department to disapprove an agreement in Subsection 708(f)(1), there are no such constraints on the first review. By simply declining to grant permission, or requesting further justification, the

Justice Department could indefinitely delay even the preliminary steps to identify the need and purpose of the agreement.

It should be noted that under the original DPA provisions, sponsors established a practice of consulting informally with the Department of Justice from the beginning of their efforts to establish an agreement. (See testimony of Assistant Attorney General Stanley Barnes, cited on page 3-8 of Volume 2 of this series.) In the future, sponsors would be likely to follow the same procedure. Therefore, the requirement for two notifications only increases the probability of delay without providing additional opportunity for the Justice Department to help develop and comment on the agreement.

Attendance at Meetings - A new Subsection 708(e)(3)(A) requires a representative of the Department of Justice and the Federal Trade Commission to attend all meetings to develop an agreement. (The law separately provides that Justice and FTC representatives may attend any meeting to carry out a voluntary agreement.) Like the first requirement mentioned in this section, this could delay development of voluntary agreements, especially in an emergency when large numbers might be developed simultaneously. Changing this provision to permit, but not require, Justice/FTC presence at meetings to develop agreements would preserve their right to attend while avoiding potential delays if staff personnel were unavailable.

#### A.1.2 Recommendations

- Change Subsections 708(c)(2) and (f)(1)(B) to clarify that formal review/approval by Justice/FTC is needed on only one occasion, after the agreement has been developed; retain current language specifying the basis for Justice to reject or modify the agreement

- Delete Subsections 708(e)(3)(A)(i) and (ii) requiring Justice/FTC attendance at meetings to develop agreements, and provide instead that they may attend such meetings.

## A.2 NOTICE AND ADMINISTRATIVE DELAY REQUIREMENTS

Five separate provisions of Section 708 require public notice or allow the public to attend meetings to develop or implement voluntary agreements. These requirements are discussed in the following section.

### A.2.1 New Requirements

Rulemaking - Several subsections of Section 708 apply the rulemaking requirements of the Administrative Procedures Act (5 U.S.C. 553) or similar requirements to regulations issued to implement Section 708. Subsection 708(e)(1) makes these rulemaking procedures subject to APA (which generally requires public notice and allows public comment on proposed rules). The DPA generally is not subject to APA requirements.

Subsection 708(e)(2) requires that all proposed new rules be published for comment in the Federal Register at least 30 days before they take effect. This goes beyond the requirements of the APA in several ways. First, the APA authorizes exceptions to its notice requirements whenever the rulemaking relates to:

- "A military or foreign affairs function of the United States"
- "Interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice"

- "When the agency for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

It is likely, especially in an emergency, that the Director of FEMA would find that proposed new rules to implement Section 708 should be exempt from the APA public notice requirements for one or more of these reasons. Subsection 708(e)(2) prohibits these exemptions.

Moreover, Subsection 708(e)(2) contains several requirements that are not contained in the APA. For example, the APA only requires public notice of proposed new rulemakings; the DPA requires that this notice be provided at least 30 days before the rule takes effect. Moreover, the DPA gives "interested persons" the right to petition for "issuance, amendment, or repeal" of a regulation to implement voluntary agreement authorities. This provision is not contained in the APA.

While these requirements are not a major barrier to implementation of voluntary agreements, they could delay efforts to issue new regulations implementing program authorities. Especially during an emergency, there may be good reasons to exempt issuance of regulations from public notice requirements; Subsection 708(e)(2) makes it impossible to do so.

Public notice of meetings - Two sections require public notice of meetings to develop or carry out voluntary agreements. Two related sections allow outsiders to attend these meetings, except under certain circumstances.

Subsection 708(e)(3)(B) requires publication of a notice in the Federal Register at least seven days before any meeting to develop a voluntary agreement, and Subsection 708 (e)(3)(D) allows interested persons to attend any such meeting unless the meeting is closed because the subject matter is classified or specifically exempt from public disclosure by statute. The implementing regulation (44 CFR 332.5) also allows sponsors to restrict attendance on the basis that trade secrets or proprietary commercial or financial information will be discussed. However, this exemption is not authorized by the DPA and it is unlikely that attendance could be restricted on this basis. This is a critical flaw in the DPA.

Similarly, notice must be published in the Federal Register prior to any meeting to carry out an agreement, and interested persons may attend any such meeting, unless the meeting will be closed because of the previously-mentioned exemptions. If the meeting is closed, a notice must be published in the Federal Register within 10 days after the meeting (Subsections 708(h)(7) and (8)).

These public notice requirements are impracticable. During a mobilization, some voluntary agreements might be in nearly-continuous operation and it would be nearly impossible to comply with the public notice requirements.

Attendance of nonparticipants is probably also undesirable. This would serve very little purpose and would probably impede the operations of any voluntary agreement. Participants would probably be very reluctant to conduct any business if business competitors who were not subject to the restrictions of the agreement were allowed to attend. This requirement could have some bizarre implications. For example, in Chapter 9 of Volume 3, we discussed a voluntary agreement

that might allow domestic machine tool producers to cooperate to improve their competitive posture and responsiveness; the DPA could permit their Japanese competitors to attend any of their meetings. (A separate section of the DPA would allow them to submit their views on the voluntary agreement, a prospect that would certainly delight foreign competitors or representatives of unfriendly foreign powers.)

During the 1950s, when voluntary agreements were quite active, the Attorney General was opposed to the attendance of nonparticipants because of the risk of anticompetitive behavior on the part of nonparticipants. This attitude appears to be more sensible than the current requirement for open meetings.

#### A.2.2 Recommendations

- Repeal Subsection 708(e)(2). This would leave rulemaking procedures for voluntary agreements subject to the Administrative Procedures Act (unlike other DPA programs), but would remove the other excessively restrictive public notice requirements
- Repeal Subsections 708(e)(3)(B) and (D) and Subsections 708(h)(7) and (8), and instead require after the fact notice of meetings to develop voluntary agreements (in Subsection 708(e)(3)) and general after the fact notice of activities to carry out voluntary agreements (in Subsection 708(h)). This would permit adequate public notice of the activities of voluntary agreements without subjecting sponsors to excessive paperwork requirements. The requirements for open meetings are unjustified, and should simply be repealed.

### A.3 RECORDKEEPING AND DISCLOSURE REQUIREMENTS

Five separate provisions of Section 708 subject sponsors and participants to elaborate recordkeeping and disclosure requirements. These requirements could be administratively burdensome and could require participants to release significant volumes of their own business records.

#### A.3.1 New Requirements

Subsection 708(d)(2) requires a complete transcript of advisory committee meetings related to voluntary agreements to be deposited with the Attorney General and Federal Trade Commission. Similarly, Subsection 708(e)(3)(E) requires a transcript for all meetings to develop an agreement. These transcripts are available to the public except for portions that are classified or specifically exempt from disclosure by statute.

The recordkeeping requirements for operational voluntary agreements are even more burdensome. Subsection 708(h)(1) requires:

... the maintenance, by participants in any voluntary agreement, of documents, minutes of meetings, transcripts, records, and other data related to the carrying out of any voluntary agreement.

Subsection 708(h)(2) requires participants to agree, in writing, to make all such information available to the sponsor, Justice Department, and Federal Trade Commission. Subsection 708(h)(3) makes this information available to the public unless it is classified or specifically exempt from disclosure by federal statute.

These five subsections would probably make it impossible to implement voluntary agreements on a widespread basis. Preparation of transcripts, alone, would be a substantial administrative burden for sponsors. (In the past, sponsors were generally required to keep only minutes of meetings, not verbatim transcripts.)

The requirements for recordkeeping and disclosure by participants in voluntary agreements would undoubtedly make companies reluctant to participate in these agreements, unless regulations carefully limited the amounts and types of information that they had to disclose. As written, the law could be interpreted as requiring very broad disclosure of business information and trade secrets having little to do with the actual operations of the agreement.

It is significant that all of the public disclosure and open meeting requirements in Section 708 cite exemptions under the Freedom of Information Act (FOIA) as the basis for closing meetings to the public or denying disclosure of information. The FOIA was written, and has been interpreted, to require maximum disclosure of information. Public disclosure exemptions have been interpreted very narrowly, and it is difficult to justify withholding information. Thus, even the authorized disclosure exemptions for classified information or material specifically exempted by law from disclosure are interpreted narrowly. Moreover, these disclosure requirements in Section 708 mention only two FOIA exemptions -- national security and information "specifically exempted from disclosure by statute." No mention is made in the DPA of the FOIA exemption for "trade secrets and commercial or financial information."



There is no justification for omitting this exemption.

Under voluntary agreements, participants may frequently be asked to share their trade secrets with competitors in the interests of national security. Even in an emergency, companies may be reluctant to share these trade secrets. This reluctance would be increased significantly unless the DPA protected this information from disclosure to nonparticipants who are not bound by the provisions of the voluntary agreement. This omission alone could be a fatal barrier to revival of the voluntary agreements program.

#### A.3.2 Recommendation

- FEMA should review the recordkeeping and disclosure requirements and develop an amendment to reduce the administrative burden on sponsors and the excessive disclosure requirements on individual participants. At a minimum, all requirements for disclosure of records should authorize exemptions for corporate trade secrets and financial information.

### A.4 LIMITED ANTITRUST PROTECTION

#### A.4.1 New Procedures

Before 1975, participants in voluntary agreements were granted immunity from antitrust prosecution for any action to carry out a voluntary agreement. In 1975, Subsection 708(j) was added, providing that participants only received a defense against antitrust charges, and then only under very limited circumstances. To claim this defense, the participant must show:

- That the action was taken in good faith to develop or carry out a voluntary agreement
- That he fully complied with the requirements of Section 708 and all rules and regulations issued under Section 708
- That he acted in accordance with the terms of the voluntary agreement.

While a "defense" against antitrust charges provides significant protection, it may not be adequate. Clearly, the Justice Department would be reluctant to prosecute for actions taken under a voluntary agreement if they knew that the participant could cite this authority in his defense. The fact that the defense is authorized by law, coupled with the fact that the Justice Department had approved and monitored the agreement, would make it all but impossible for a Federal prosecution to prevail. Nevertheless, the DPA does not shield participants from risk. Lawsuits could be brought by third parties or by the Federal Government (perhaps even many years later under a different Administration than the original sponsor).

Moreover, there are severe limits on a participant's ability to raise even the defense authorized by Section 708. While it is not unreasonable to require that participants show that their actions were taken to develop or carry out a voluntary agreement and that they complied with the law and the terms of the agreement, it could be extremely difficult to prove good faith or compliance with all regulations implementing Section 708 authorities.

The limited protection is a major barrier because most businesses would probably decline to participate in

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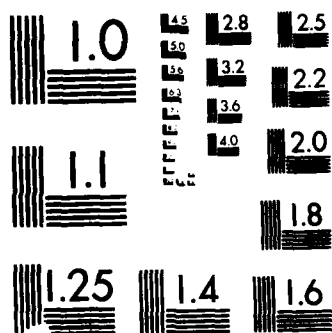
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voluntary agreements if they perceived any significant risk of antitrust prosecution for their activities. Even if the risk of successful prosecution were considered low, the cost of a defense would be substantial and the discovery process associated with the lawsuit could be time-consuming and damaging to the business interests of the participants.

#### A.4.2 Recommendation

- Amend Subsection 708(j) to provide immunity for actions to carry out a voluntary agreement that are in compliance with the DPA and the terms of the agreement. The requirements for participants to demonstrate good faith and compliance with regulations should also be deleted.

#### A.5 SUMMARY

It would be attractive to return Section 708 to the original 1950 formulation of the DPA, which provided a relatively simple administrative procedure for establishing voluntary agreements. (The different versions of Section 708 are presented in Appendix C of Volume 2 in this series.) However, this appendix does not recommend that FEMA attempt to restore the original DPA provisions. Especially in peacetime, it would probably not be possible to obtain Congressional approval for such a proposal, nor would such an amendment be effective even if it were accepted. Instead, this appendix recommends narrowly focused amendments aimed at correcting specifically identified problems.

As noted in Volume 2, many of the new requirements added to Section 708 in 1975 were not actually new. Some of them had been applied informally ever since the original 1950 approval of the DPA. For example:

- Although the law did not require consultation with the Attorney General prior to development of the agreement, sponsors nearly always consulted informally from the beginning of their efforts to develop an agreement
- Although the law did not require a full-time federal employee to chair meetings, this was required as a matter of general practice by the Attorney General
- Although the DPA did not mention record-keeping requirements, the Attorney General required sponsors to prepare the agenda and complete minutes for all meetings. (See Section 3.2.1 of Volume 2.)

Similarly, these requirements would probably be provided in future regulations, even if the legal requirements were repealed, largely because they make sense. Some of the administrative requirements written into Section 708 in 1975 protect both the public interest and the interests of participants in the agreements. For example, if Federal employees were not required to attend the meetings, neither the government nor the public could be certain that the participants had not engaged in collusive behavior. Similarly, if no records at all were kept, participants would not be able to defend themselves against such charges if they were made by the press or Congress.

During a fullscale mobilization, it might be necessary to propose sweeping changes to Section 708. Such changes might be far broader than the original DPA formulation. As we noted in Chapter 3 of Volume 2, even this original DPA provision was much more restrictive than the groundrules that applied to industry committees in World War II. During a major emergency, legislation might be proposed more similar to the World War II groundrules (which required only notification

of the Department of Justice, rather than approval). Another alternative would be simply to suspend antitrust laws for the duration of the emergency. Both of these alternatives would have numerous public policy implications that should be considered carefully in the course of a broader examination of standby emergency legislation. (It is worth noting that the Defense Resources Act, FEMA's current draft standby emergency powers statute, is content to propose only restoration of the original DPA language. Any reconsideration of emergency powers legislation should consider broader proposals.)

However, there would be little purpose in proposing such a sweeping DPA amendment in peacetime. Nor is there any need for such legislation in peacetime even if it were feasible. Instead of defining a sweeping change to Section 708, which would probably not be accepted in peacetime (and therefore could not remove bottlenecks to peacetime revival of the program), this appendix has attempted to identify those legal requirements that are unreasonable, that could unnecessarily delay formation and operation of voluntary agreements, or that could limit the willingness of business to participate in these agreements. Such a legislative package could be more easily justified by FEMA, and FEMA should proceed to develop a legislative proposal to correct the problems that were identified in this appendix.

APPENDIX B  
POSSIBLE PROBLEMS IN AGENCY REGULATIONS  
AND PROGRAM DESCRIPTIONS



## POSSIBLE PROBLEMS IN AGENCY REGULATIONS AND PROGRAM DESCRIPTIONS

Recommendation #13 suggests that FEMA reconsider and revise program regulations, including the Defense Mobilization Order that defines program requirements. This appendix discusses the need for changing these documents.

### B.1 DEFENSE MOBILIZATION ORDER

The basic authority for voluntary agreements, Section 708 of the Defense Production Act, is both complex and confusing. It is complex in the sense that it requires many actions by many different agencies, and confusing because it does not lay out these actions in a precise, step-by-step manner. The implementing regulation (44 CFR, Chapter 1, Section 332) reduces the confusion by explaining some of the procedures. But it also adds to the complexity by defining additional requirements that are not prescribed by the DPA. While none of the problems discussed in this appendix are fatal barriers to a revival of the voluntary agreements program, they could delay revival efforts.

The following sections discuss three separate problems with the implementing regulations:

- One proviso of Section 708 of the DPA that is not mentioned in the CFR
- Two aspects of the program that would be clearer if there were a better explanation of procedures and requirements

- Several procedural requirements in the CFR that go beyond the requirements of the DPA.

#### B.1.1 Limit on Delegation of Authority

Subsection 708(c)(2) of the DPA authorizes delegation of Presidential authorities to consult with industry and form voluntary agreements to officials who have been confirmed by the Senate. However, in the case of voluntary agreements to carry out Title I of the DPA (priorities and allocations), this subsection provides that the authority may only be delegated to a single government official. Executive Order (E.O.) 10480 currently provides that this official shall be the Director of FEMA.

This proviso is not mentioned in the CFR. At a minimum, it should be mentioned. The best place to do this would probably be in Subpart 332.1(b), which presently deals with sponsorship, delegation, and the role of FEMA.

#### B.1.2 Voluntary Agreements to Carry Out Title I

The first area that should probably be expanded upon in the CFR also concerns Title I voluntary agreements. Title I-related voluntary agreements would be very different from other voluntary agreements, but there is no description in the DMO of these differences. Most basically:

- What constitutes an agreement to carry out Title I of the DPA
- Who decides whether an agreement carries out the purpose of Title I
- How is this decision recorded?

Whether an agreement will or will not be considered a Title I agreement must be determined at the outset, because it determines who (program agency or FEMA) has authority to take the very first action (i.e., the finding prescribed by Subsection 708(c)(1) that the agreement is needed). Documenting these basic issues would clarify the status of these agreements.

In this context, some consideration should be given to the definition of "Sponsor." As defined in the CFR, the "sponsor" is both the proponent of the voluntary agreement and the official who was delegated Presidential authorities. For "regular" voluntary agreements, this would indeed typically be the same person. However, in the case of Title I-related voluntary agreements it is possible that this definition could really refer to two different people: an agency official who is the proponent of the agreement, and the Director of FEMA, who has the delegated authority and must make key milestone findings and decisions.

Optimally, there would be a separate section of the CFR that describes the process of establishing and activating voluntary agreements to carry out Title I of the DPA and highlights differences between these and other agreements.

#### B.1.3 Standby Voluntary Agreements

The second CFR issue that should be clarified is the concept of standby voluntary agreements. Presently, neither the law nor the regulation refer to this concept. Thus, no procedures for establishing standby voluntary agreements are defined. More importantly, there are no defined procedures for activating already-approved standby voluntary agreements. Thus, the proponent of a standby voluntary agreement must handcraft activation procedures and put them in the agreement

itself. The implied precedent of the only existing standby voluntary agreement (the tanker capacity agreement) is discouraging. Even though this agreement went through the entire approval process before its approval as a standby voluntary agreement, the activation process defined in the agreement amounts almost to a repetition of the approval process for a second time.

The issue should be identified and defined in the CFR. Two choices might be to:

- Establish a shortened approval cycle upfront for standby voluntary agreements, or
- To shorten the activation procedure.

Either way, it should be clarified. Otherwise, if the government pursues large numbers of standby voluntary agreements, proponents are likely to wind up with differing activation procedures. This, in turn, would confuse the issue during an emergency when large numbers of standby voluntary agreements need to be activated rapidly. Obviously, it will not be possible to write "one size fits all" activation procedures. Different types of agreements might require different procedures. But it should be possible to establish some general criteria and procedures.

#### B.1.4 New Procedures Not Required by the DPA

The CFR requires sponsors to notify FEMA of their actions on several occasions during the development, approval, and implementation process. On one occasion (approval of the agreement), the CFR requires FEMA's concurrence. None of these notifications are required by the DPA. Except for the

limited set of Title I-related voluntary agreements, the DPA does not require FEMA program coordination. Instead, it provides for direct delegation of authority from the President to sponsoring agencies.

E.O. 10480, of course, does provide for general supervision of the program, and it is probably on this basis that the CFR provides this role. FEMA should take a careful look at these requirements. While the program coordination role is essential, FEMA should weigh the benefits of each individual requirement it adds in the CFR against the potential delay that the requirement can cause. The requirement for FEMA to approve the certification made by the Sponsor (332.2(e)(2)) is especially significant because it could significantly delay the process.

## B.2 MAJOR EMERGENCY ACTIONS

This section discusses the July 1985 FEMA document Major Emergency Actions: Industrial Production. While the writeup on voluntary agreements is generally accurate, it contains several possible problems. As with the discussion of regulatory issues in Section B.1, this section has two general thrusts:

- Ambiguities in the law or regulation could cause considerable confusion and delay in establishing voluntary agreements
- Any procedural requirement going beyond the literal requirements of the DPA should be considered carefully to make sure that the benefits of improved program coordination outweigh any possible delays or confusion.

### B.2.1 Authorities (p. IP-04/3)

The MEA states that E.O. 10480 "delegates President's authority to consult with industry to FEMA ..." This represents the problem discussed earlier regarding the difference between "normal" and "Title I" voluntary agreements. (See Appendix B, Section B.1.1.) In the case of voluntary agreements to carry out Title I of the DPA, the President's authorities are indeed delegated to FEMA. But for the conventional type of voluntary agreement, the President's authorities are delegated to the sponsoring agency. The writeup should be changed to reflect this.

### B.2.2 Decision Process for Developing a Voluntary Agreement (p. IP-04/4)

The description of the decision process for developing a voluntary agreement contains two steps that are not required by either the Defense Production Act or the CFR regulation (44 CFR 332). These are summarized below.

Review of defense need - Section c states that after the sponsor submits his proposal to develop an agreement, FEMA "reviews the national defense need for the agreement and provides direction on the relationship of the proposal to other preparedness programs." While this is not an illogical requirement, it is not specifically mentioned in either the DPA or the CFR. (It should be noted that the law did previously allow another agency to question the sponsor's finding of need. The 1955 amendments required DOJ to assess the national defense need for an agreement. General Leslie Bray, then director of the Federal Preparedness Agency, argued strongly -- and successfully -- against a similar requirement during his testimony on the 1975 DPA amendments.)

A review of this issue by FEMA would not necessarily be burdensome. FEMA would probably be sympathetic to the national security goals of the agreement and relatively unlikely to modify or delay it. Nevertheless, the requirement presents yet another procedural obstacle -- by itself not especially troublesome -- to the creation of voluntary agreements. It is also "one more block to check off" for the sponsor.

Approval to develop agreement - Section e states that both DOJ and FEMA must grant approval before the sponsoring agency can proceed to develop the agreement. The FEMA approval requirement is not mentioned in either the DPA or the CFR. (The DPA requires that DOJ be notified and give its approval. The CFR adds a requirement to notify FEMA, but does not require a separate approval.) Again, this adds an unnecessary potential delay in the process of developing an agreement.

B.2.3 Decision Process for Carrying Out a Voluntary Agreement (p. IP-04/5)

This section contains one requirement that appears to go far beyond any requirements of the law or regulation. Section b states that:

Sponsoring agency's initiation or approval of each meeting to carry out a voluntary agreement is subject to concurrence of FEMA as the agency having overall direction and control.  
(emphasis added)

The section of the regulation cited as authority for this requirement gives FEMA overall direction and control over the sponsor's activities. However, it does not describe any specific requirements such as this one. Separately, the regulation requires the sponsor to notify DOJ, the FTC, and FEMA in

advance of each meeting but does not require any agency to approve the meeting. The requirement for advance approval of meetings could be extremely burdensome for both FEMA and sponsoring agencies.

### B.3 CONCLUSION

The regulatory issues discussed in this appendix could pose a number of problems. First is the mere fact that the various descriptions of procedures for voluntary agreements are in conflict. There is no single authority that a sponsor can consult to see what he should do. The conflicts themselves -- regardless of their substance -- are likely to confuse sponsors and delay formation of agreements.

Second, the additional procedural requirements could significantly delay creation of agreements. Table B.3-1 shows procedural steps prescribed by the CFR or the MEA that are not mentioned in the DPA. Those marked with an asterik, in particular, should be reconsidered. These represent milestones where the sponsor cannot proceed until FEMA makes an approval.

FEMA's interests as a proponent of the program are probably best served by eliminating any unnecessary potential delays, and its separate interests as monitor of the program are already adequately protected without these requirements. The CFR already provides (without these additional steps) that FEMA shall exercise overall direction and control, that sponsors must notify FEMA of every proposed action, and that FEMA may cancel or modify an agreement at any time. FEMA can protect the public interest adequately by exercising its general monitoring authority and acting by exception, without adding these specific delay points.



TABLE B.3-1  
ADDITIONAL PROCEDURES NOT REQUIRED BY DPA

<u>CFR/MEA Requirement</u>	<u>DPA Requirement</u>	<u>Source of New Requirement</u>
Sponsor must notify FEMA of proposal to form agreement	Notify DOJ and FTC	44 CFR 332.2(b)(1)
*FEMA reviews national defense need for agreement and provides direction on the relationship of the proposal to other preparedness programs	No similar DPA requirement	MEA IP-04/4
*FEMA must approve proposal before sponsor can proceed	DOJ approval	MEA IP-04/4
Sponsor must notify FEMA of meetings to develop agreement	Notify DOJ and FTC	44 CFR 332.2(c)(1)
Transcript of meetings and text of voluntary agreement must be submitted to FEMA	Submit to DOJ and FTC	44 CFR 332.2(d)
*FEMA must approve agency certification of need for agreement	No similar DPA requirement	44 CFR 332.2(e)(2)
Sponsor must notify FEMA of each meeting	Notify DOJ and FTC	44 CFR 332.3(c)(2)
*FEMA must approve each meeting	No similar DPA requirement	MEA IP-04/5
FEMA may direct sponsor to modify or terminate a voluntary agreement	DOJ or sponsor may terminate	44 CFR 332.4

\*Milestones which require FEMA's approval before sponsor can proceed

Third, these "extra" requirements could undercut any efforts to address the genuinely excessive procedural requirements in the law itself. FEMA's credibility in arguing that congressionally-imposed micromanagement impedes revival of this program would be seriously impaired if it were shown that FEMA itself had added additional requirements over and above those imposed by law.

Finally, the absence of a single authoritative program description is made more serious by the lack of definition in the regulation of two important aspects of the program: processes for agreements to carry out Title I of the DPA and processes to establish and activate standby voluntary agreements.

The additional requirements could be defended as providing definition to the general statement that FEMA shall exercise direction and control over the program. None of the requirements is totally illogical. The main problem is that these documents represent ad hoc, rather than systematic, planning. It appears that FEMA and other agencies have not consciously decided:

- What the objective of the program will be
- What role FEMA should play in accomplishing this objective
- How the process will be defined for potential users.

Instead, program planning and documentation appears to have been developed on a case-by-case basis. These threshold questions should be answered, and the process defined clearly, before the program can be revitalized.

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